LIBRARY
SUPREME COURT. U. S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1959

No. 278

HARRY NEEDELMAN, PETITIONER,

vs.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 4, 1959

CERTIORARI GRANTED OCTOBER 12, 1959

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 278

HARRY NEEDELMAN, PETITIONER,

vs.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

INDEX

	Original	Print
Record from the U.S.D.C. for Southern District of Florida		
Indictment in case No. 9479-M-Cr.	2	1
Indictment in case No. 10,348-M-Cr.	3	2
Motion for production and inspection of documents	11	8
Order on motions to consolidate, for production and inspection of documents and motion to suppress	14	9
Stipulation as to facts, etc.	15	10
Judgment of acquittal (Conspiracy Charge)	17	11
Verdict (Substantive Charge)	17	12
Motion for new trial	18	12
Order granting motion for new trial as to counts 11, 12, 13, 14 and 15 and denying motion for new trial as to counts 1 through 10, filed in case No. 10,348-M-Cr.	20	14
Judgment and commitment in case No. 10,348-M-Cr.	21	14

RECORD PRESS, PRINTERS, NEW YORK, N. Y., JANUARY 29, 1960

	Original	Print
Record from the U.S.D.C. for Southern District of Florida—Continued		
Order dismissing counts 11, 12, 13, 14 and 15 of indictment herein	23	15
Transcript of sentence proceedings filed in case No. 10,348-M-Cr.	23	16
Notice of appeal	28	19
Transcript of trial proceedings filed in both cases	31	19
Appearances	31	19
Testimony of Sally Rossman—		
direct	36	20
redirect	72	27
recross	77	28
Lillian Fredericks—		
direct	80	29
Bernice Sachs—		
direct	115	33
David Kamisarow—		
direct	141	39
cross	153	47
redirect	161	52
K. C. Rudd—		
direct	187	54
K. C. Rudd (out of presence of jury)—		
direct	194	58
Walter Waxman (out of presence of jury)—		
direct	199	61
Denial of motion to suppress	202	63
Testimony of K. C. Rudd—		
(resumed)—		
direct	203	64
cross	220	75
redirect	247	92
Denial of motion for production of notes	248	93
Testimony of K. C. Rudd—		
recross	249	93
Edwin S. Waters—		
direct	251	95

	Original	Print
Record from the U.S.D.C. for Southern District of Florida—Continued		
Transcript of trial proceedings filed in both cases—Continued		
Testimony of Dr Harry Needelman—		
direct	337	101
cross	373	124
Motion for judgment of acquittal and denial thereof	393	137
Excerpt from Narcotic Case Report	415A	138
Proceedings in the U.S.C.A. for the Fifth Circuit	416	146
Minute entry of argument and submission (omitted in printing)	416	146
Opinion, Rives, J.	417	146
Judgment	426	153
Petition for rehearing	427	154
Preliminary order on petition for rehearing	430	156
Order denying rehearing	431	157
Clerk's certificate (omitted in printing)	432	157
Order allowing certiorari	433	157

[fol. 1]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA, Plaintiff,

vs.

HARRY NEEDELMAN and WALTER WAXMAN, Defendants.

[fol. 2]

INDICTMENT IN CASE NO. 9479-M-Cr.—Filed October 18, 1955

The Grand Jury charges:

That from on or about August 6, 1955, and continuing through and including September 23, 1955, in Dade County, in the Southern District of Florida,

HARRY NEEDELMAN and WALTER WAXMAN

did unlawfully, wilfully and knowingly combine, conspire, confederate and agree between themselves and with Lillian Fredericks, Sally Rossman, David Komisarow, and Bernice Sachs and other persons to the Grand Jurors unknown, to violate the laws of the United States, to wit, Title 26, United States Code, Section 4705(a), that is to say, to sell, barter, exchange and give away narcotic drugs, to wit, codeine amidone, also known as dolophine, also known as methadon, and demerol, also known as isonipecaine, not in pursuance of written orders of the persons to whom said narcotic drugs were sold, bartered, exchanged and given on forms issued in blank for that purpose by the Secretary or his delegate.

That in furtherance of the said conspiracy and to effect the objects thereof, the following overt act was committed;

Overt Act

That on or about September 19, 1955, in Dade County, in the Southern District of Florida, Walter Waxman did sell [fol. 3] 2¼ one-grain codeine sulphate tablets to Abe Bruches.

A True Bill

Henry Hood, Foreman.

E. David Rosen, Assistant U. S. Attorney.

IN UNITED STATES DISTRICT COURT

INDICTMENT IN CASE No. 10,348-M-Cr.—Filed October 2, 1957

The Grand Jury charges:

That on or about the 8th day of August, 1955, in Dade County, in the Southern District of Florida,

HARRY NEEDLEMAN

did sell, barter, exchange, give away and cause to be sold, bartered, exchanged and given away narcotic drugs, to wit, 24 tablets, each containing 10 milligrams of amidone, also known as dolophine, also known as methadon, to Gerald Miller, not in pursuance of the written order of the person to whom said narcotic drugs were sold, bartered, exchanged and given on forms issued in blank for that purpose by the Secretary or his delegate; in violation of Title 26, United States Code, Section 4705 (a).

Second Count

The Grand Jury further charges:

That on or about the 9th day of August, 1955, in Dade County, in the Southern District of Florida,

[fol. 4] HARRY NEEDLEMAN

did sell, barter, exchange, give away and cause to be sold, bartered, exchanged and given away narcotic drugs, to wit, 24 tablets, each containing 10 milligrams of amidone, also known as dolophine, also known as methadon, to Gerald Miller, not in pursuance of the written order of the person to whom said Narcotic drugs were sold, bartered, exchanged and given on forms issued in blank for that purpose by the Secretary or his delegate; in violation of Title 26, United States Code, Section 4705 (a).

Third Count

The Grand Jury further charges:

That on or about the 12th day of August, 1955, in Dade County, in the Southern District of Florida,

HARRY NEEDELMAN

did sell, barter, exchange, give away and cause to be sold, bartered, exchanged and given away narcotic drugs, to wit, 24 tablets, each containing 10 milligrams of amidone, also known as dolophine, also known as methadon, to Gerald Miller, not in pursuance of the written order of the person to whom said narcotic drugs were sold, bartered, exchanged and given on forms issued in blank for that purpose by the Secretary or his delegate; in violation of Title 26, United States Code, Section 4705 (a).

[fol. 5] Fourth Count

The Grand Jury further charges:

That on or about the 14th day of August, 1955, in Dade County, in the Southern District of Florida,

HARRY NEEDELMAN

did sell, barter, exchange, give away and cause to be sold, bartered, exchanged and given away narcotic drugs, to wit, 24 tablets, each containing 10 milligrams of amidone, also known as dolophine, also known as methadon, to Gerald Miller, not in pursuance of the written order of the person to whom said narcotic drugs were sold, bartered, exchanged and given on forms issued in blank for that purpose by the Secretary or his delegate; in violation of Title 26, United States Code, Section 4705 (a).

Fifth Count

The Grand Jury further charges:

That on or about the 17th day of August, 1955, in Dade County, in the Southern District of Florida,

HARRY NEEDELMAN

did sell, barter, exchange, give away and cause to be sold, bartered, exchanged and given away narcotic drugs, to wit, 24 tablets, each containing 10 milligrams of amidone, also known as dolophine, also known as methadon, to Gerald Miller, not in pursuance of the written order of the person to whom said narcotic drugs were sold, bartered, exchanged

[fol. 6] and given on forms issued in blank for that purpose by the Secretary or his delegate; in violation of Title 26, United States Code, Section 4705 (a).

Sixth Count

The Grand Jury further charges:

That on or about the 8th day of August, 1955, in Dade County, in the Southern District of Florida,

HARRY NEEDELMAN

did sell, barter, exchange, give away and cause to be sold, bartered, exchanged and given away narcotic drugs, to wit, 24 tablets, each containing 10 milligrams of amidone, also known as dolophine, also known as methadon, to Fidel Garcia, not in pursuance of the written order of the person to whom said narcotic drugs were sold, bartered, exchanged and given on forms issued in blank for that purpose by the Secretary or his delegate; in violation of Title 26, United States Code, Section 4705 (a).

Seventh Count

The Grand Jury further charges:

That on or about the 9th day of August, 1955, in Dade County, in the Southern District of Florida,

HARRY NEEDELMAN

did sell, barter, exchange, give away and cause to be sold, bartered, exchanged and given away narcotic drugs, to wit, 24 tablets, each containing 10 milligrams of amidone, also [fol. 7] known as dolophine, also known as methadon, to Fidel Garcia, not in pursuance of the written order of the person to whom said narcotic drugs were sold, bartered, exchanged and given on forms issued in blank for that purpose by the Secretary or his delegate; in violation of Title 26, United States Code, Section 4705 (a).

Eighth Count

The Grand Jury further charges:

That on or about the 12th day of August, 1955, in Dade County, in the Southern District of Florida,

HARRY NEEDELMAN

did sell, barter, exchange, give away and cause to be sold, bartered, exchanged and given away narcotic drugs, to wit, 24 tablets, each containing 10 milligrams of amidone, also known as dolophine, also known as methadon, to Fidel Garcia, not in pursuance of the written order of the person to whom said narcotic drugs were sold, bartered, exchanged and given on forms issued in blank for that purpose by the Secretary or his delegate; in violation of Title 26, United States Code, Section 4705 (a).

Ninth Count

The Grand Jury further charges:

That on or about the 14th day of August, 1955, in Dade County, in the Southern District of Florida,

HARRY NEEDELEMAN

did sell, barter, exchange, give away and cause to be sold, [fol. 8] bartered, exchanged and given away narcotic drugs, to wit, 24 tablets, each containing 10 milligrams of amidone, also known as dolophine, also known as methadon, to Fidel Garcia not in pursuance of the written order of the person to whom said narcotic drugs were sold, bartered, exchanged and given on forms issued in blank for that purpose by the Secretary or his delegate; in violation of Title 26, United States Code, Section 4705 (a).

Tenth Count

The Grand Jury further charges:

That on or about the 17th day of August, 1955, in Dade County, in the Southern District of Florida,

HARRY NEEDELMAN

did sell, barter, exchange, give away and cause to be sold, bartered, exchanged and given away narcotic drugs, to wit, 24 tablets, each containing 10 milligrams of amidone, also known as dolophine, also known as methadon, to Fidel Garcia, not in pursuance of the written order of the person to whom said narcotic drugs were sold, bartered, exchanged

and given on forms issued in blank for that purpose by the Secretary or his delegate, in violation of Title 26, United States Code Section 4705 (a).

Eleventh Count

The Grand Jury further charges:

That on or about the 9th day of August, 1955, in Dade [fol. 9] County, in the Southern District of Florida,

HARRY NEEDELMAN

did sell, barter, exchange, give away and cause to be sold, bartered, exchanged and given away narcotic drugs, to wit, 24 tablets, each containing 10 milligrams of amidone, also known as dolophine, also known as methadon, to Alice Buonauto, not in pursuance of the written order of the person to whom said narcotic drugs were sold, bartered, exchanged and given on forms issued in blank for that purpose by the Secretary or his delegate; in violation of Title 26, United States Code Section 4705(a).

Twelfth Count

The Grand Jury further charges:

That on or about the 11th day of August, 1955, in Dade County, in the Southern District of Florida,

HARRY NEEDELMAN

did sell, barter, exchange, give away and cause to be sold, bartered, exchanged and given away narcotic drugs, to wit, 24 tablets, each containing 10 milligrams of amidone, also known as dolophine, also known as methadon, to Alice Buonaiuto, not in pursuance of the written order of the person to whom said narcotic drugs were sold, bartered, exchanged and given on forms issued in blank for that purpose by the Secretary or his delegate; in violation of Title 26, United States Code, Section 4705 (a).

[fol. 10] Thirteenth Count

The Grand Jury further charges:

That on or about the 12th day of August, 1955, in Dade County, in the Southern District of Florida,

HARRY NEEDELMAN

did sell, barter, exchange, give away and cause to be sold, bartered, exchanged and given away narcotic drugs, to wit, 24 tablets, each containing 10 milligrams of amidone, also known as dolophine, also known as methadon, to Alice Buonaiuto, not in pursuance of the written order of the person to whom said narcotic drugs were sold, bartered, exchanged and given on forms issued in blank for that purpose by the Secretary or his delegate; in violation of Title 26, United Code, Section 4705 (a).

Fourteenth Count

The Grand Jury further charges:

That on or about the 14th day of August, 1955, in Dade County, in the Southern District of Florida,

HARRY NEEDELMAN

did sell, barter, exchange, give away and cause to be sold, bartered, exchanged and given away narcotic drugs, to wit, 24 tablets, each containing 10 milligrams of amidone, also known as dolophine, also known as methadon, to Alice Buonaiuto, not in pursuance of the written order of the person to whom said narcotic drugs were sold, bartered, [fol. 11] exchanged and given on forms issued in blank for that purpose by the Secretary or his delegate; in violation of Title 26, United States Code, Section 4705 (a).

Fifteenth Count

The Grand Jury further charges:

That on or about the 17th day of August, 1955, in Dade County, in the Southern District of Florida,

HARRY NEEDELMAN

did sell, barter, exchange, give away and cause to be sold, bartered, exchanged and given away narcotic drugs, to wit, 24 tablets, each containing 10 milligrams of amidone, also known as dolophine, also known as methadon, to Alice Buonaiuto, not in pursuance of the written order of the person to whom said narcotic drugs were sold, bartered,

exchanged and given on forms issued in blank for the purpose by the Secretary or his delegate; in violation of Title 26, United States Code, Section 4705(a).

A True Bill

J. W. Hendrick, Jr., Foreman.

....., Assistant U. S. Attorney.

IN UNITED STATES DISTRICT COURT

MOTION FOR PRODUCTION AND INSPECTION OF DOCUMENTS—
Filed October 17, 1957

Comes Now, the Defendants, by and through their undersigned attorneys, and moves the Court for an Order per-
[fol. 12] mitting them to inspect the books, papers, documents, memoranda and objects and particularly the contemporaneous notes made by the Government witness, Kenneth Rudd, who has previously testified in said cause and who is a material witness for the Government in said cause, made by the said Kenneth Rudd during his investigation and preparation for trial of said cause, and which said contemporaneous notes have already been referred to by the said Rudd in the previous trial of said cause, and by which testimony it was shown that said contemporaneous notes prepared by the said Rudd were of the events, activities related to his said testimony, and that the inspection and copying of said contemporaneous notes made by the said Rudd are material and necessary for the defendants to prepare their defense.

The defendant, Waxman, further moves the Court for an Order requiring the Government to produce to the defendant Waxman, or his attorney, a copy of the inventory of the stock of narcotics taken by the witness Rudd in the place of Business of Defendant Waxman, and which inventory was taken on or about September 28, 1955, by the said Rudd, and which he has previously testified to in his previous trial, but which inventory the said Rudd refused to furnish to the defendant at said trial.

Wherefore, each defendant moves the Court for an Order requiring the Government to produce said documents, or to

[fol. 13] yield them to inspect same and make copies of same.

Dan Chappell, Attorney for Defendant Walter Waxman.

Ernest E. Roberts, Attorney for Defendant Harry Needelman.

Certificate of Service (omitted in printing).

[fol. 14]

IN UNITED STATES DISTRICT COURT

ORDER ON MOTIONS TO CONSOLIDATE, FOR PRODUCTION AND INSPECTION OF DOCUMENTS AND MOTION TO SUPPRESS—November 1, 1957

This Cause coming on to be heard before me this day upon

1. Motion of the United States of America to consolidate the above-styled two cases;

2. Motion of Dan Chappell, who has substituted for Jack Kehoe as counsel for defendant Walter Waxman, and of Ernest E. Roberts, who has substituted for Harvie Duvall as counsel for defendant Harry Needelman, for production and inspection of documents; and

3. Motion of Walter Waxman to suppress, and the Court having heard argument of counsel for the respective parties and being otherwise fully informed in the premises, it is thereupon

Ordered and Adjudged:

(a) That the motion to consolidate be and the same is [fol. 15] hereby granted;

(b) That the motion for production and inspection of documents be and the same is hereby granted to the extent that counsel for the defendants shall be entitled to inspect, examine, photograph and/or copy any and all documents and any other material taken from either of the defendants;

(c) That the motion to suppress be and the same is hereby continued to the date of trial of these causes.

Done and Ordered in chambers at Miami, Florida, this 1st day of November, 1957.

Emett C. Choate, United States District Court.

IN UNITED STATES DISTRICT COURT

STIPULATION AS TO FACTS, ETC.—Filed November 13, 1957

It Is Hereby Stipulated and Agreed by and between the United States of America, the defendants, and counsel for the defendants that the following are uncontroverted facts and that this agreement and stipulation shall stand in the place of oral testimony, to wit:

1. That Codeine is an opiate derivative; that Demerol is also known as Isonipecaine; that Amidon, also known as Methadon, also known as Dolophine, has a chemical formula of 4,4-Diphenyl-6 Dimethylamino-Hepatone-3; that the aforenamed are narcotic drugs as defined in Title 26, United States Code, Section 4731;

[fol. 16] 2. That any document offered and received into evidence herein which ordered any of the above-named narcotic drugs when dispensed by Walter Waxman and/or by any of his employees whose initials appear on said documents were dispensed and distributed in the quality and quantity called for in said documents;

3. That the Codeine dispensed herein was received by the defendant Walter Waxman, trading as Medical Arts Pharmacy in the due course of business as prescribed by law, and was manufactured by Wyeth Laboratories, Philadelphia, Pennsylvania, under Control Nos. 63054 through and including 63073, and 63139 through and including 63148;

4. That the Methadon, also known as Dolophine, also known as Amidon, dispensed herein, was received by defendant Walter Waxman, trading as Medical Arts Pharmacy, in the due course of business, as prescribed by law,

and was manufactured by Ely Lilly Co., Indianapolis, Indiana, under Control Lot Nos. 650420, 646753 and 639533;

5. That the Demerol, also known as Isonipecaine, dispensed herein, was received by defendant Walter Waxman, trading as Medical Arts Pharmacy, in the due course of business, as prescribed by law, and was manufactured by Winthrop Laboratories, Rensselaer, New York, under Control Nos. 167NC and 430ND.

Dated at Miami, Florida, this 13th day of November, 1957.

[fol. 17] James L. Guilmartin, United States Attorney, By: Dave. , Assistant U.S. Attorney.

Don Chappell, Attorney for Walter Waxman, By: Walter Waxman.

Ernest E. Roberts, Attorney for Harry Needelman, By: Harry Needelman.

IN UNITED STATES DISTRICT COURT

JUDGMENT OF ACQUITTAL (CONSPIRACY CHARGE)—November 18, 1957

The Defendants, Harry Needelman and Walter Waxman, having moved the court for a Judgment of Acquittal, and the Court, having heard argument on the same, it is.

Ordered that the defendants motions for Judgment of Acquittal be, and the same are hereby granted, and the defendants, each of them, be discharged as to this case and this case only.

Done and Ordered at Miami, Florida, this 18th day of November, 1957.

Emett C. Choate, United States District Judge.

IN UNITED STATES DISTRICT COURT

VERDICT (SUBSTANTIVE CHARGE)—November 19, 1957

We, the Jury, find the Defendant, Harry Needelman,
[fol. 18]

Guilty as to count #1,
Guilty as to Count #2,
Guilty as to Count #3,
Guilty as to Count #4,
Guilty as to Count #5,
Guilty as to Count #6,
Guilty as to Count #7,
Guilty as to Count #8,
Guilty as to Count #9,
Guilty as to Count #10,
Guilty as to Count #11,
Guilty as to Count #12,
Guilty as to Count #13,
Guilty as to Count #14,
Guilty as to Count #15,

So Say We All.

O. C. Corbing, Foreman.

IN UNITED STATES DISTRICT COURT

MOTION FOR NEW TRIAL—Filed November 22, 1957

The defendant moves the Court to grant him a new trial for the following reasons:

1.

The verdict is contrary to the law.

[fol. 19]

2.

The verdict is contrary to the evidence.

3.

The verdict is contrary to the law and the evidence.

4.

The verdict is contrary to the weight of the evidence.

5.

The verdict is not supported by *substantial* evidence.

6.

The Court erred in denying defendant's motion for acquittal made at the conclusion of the Government's case.

7.

The Court erred in denying defendant's motion for acquittal made at the conclusion of all of the evidence.

8.

The testimony fails to show that the narcotics prescribed were not necessary for the relief of pain being suffered by the persons to whom the prescriptions were issued.

9.

It affirmatively appears from the testimony that the defendant was not within the jurisdiction of this Court at the time of the commission of the alleged offenses.

10.

The evidence fails to show that the persons to whom the prescriptions were issued were narcotic addicts.

[fol. 20]

11.

The evidence fails to show that the prescriptions issued to the persons receiving them were given for the purpose of satisfying their addiction to drugs.

Ernest E. Roberts, Attorney for defendant.

Certificate of Service (omitted in printing).

IN UNITED STATES DISTRICT COURT

ORDER GRANTING MOTION FOR NEW TRIAL AS TO COUNTS 11, 12, 13, 14 AND 15 AND DENYING MOTION FOR NEW TRIAL AS TO COUNTS 1 THROUGH 10, FILED IN CASE NO. 10,348-M-Cr.—December 5, 1957

This cause coming on to be heard on the defendant's motion for new trial, and the Court having heard argument of counsel and being otherwise fully advised, it is, thereupon,

Ordered, Adjudged and Decreed That the defendant's motion for new trial be granted as to Counts 11, 12, 13, 14 and 15; and it is further

Ordered, Adjudged and Decreed that the defendant's motion for new trial as to Counts 1 through 10, be and the same is hereby denied.

[fol. 21] Done and Ordered at Miami, Florida, this 5th day of December, 1957.

Emmett C. Choate, United States District Judge.

IN UNITED STATES DISTRICT COURT

JUDGMENT AND COMMITMENT IN CASE NO. 10,348-M-Cr.—December 6, 1957

On this 6th day of December, 1957, came the attorney for the government and the defendant appeared in person with counsel, Ernest Roberts, Esq.

It Is Adjudged that the defendant has been convicted upon a Verdict of Guilty by a Jury as to counts 1, 2, 3, 4, 5, 6, 7, 8, 9, and 10, of the offenses of did sell, barter, exchange, give away, and cause to be sold, bartered, exchanged and given away, certain narcotic drugs, not in pursuance of written orders on blanks issued for such purposes, as required by law. 26 USC 4705 (a) and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court.

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Two Years [fol. 22] on each count 1 through 10, which sentences are to run concurrently. Said sentence is hereby suspended and the defendant is placed on probation with the Probation Officer of the Miami Division for a period of Three Years under the conditions of probation as outlined in the Court's order entered December 1, 1939, imposing Standing Conditions of Probation.

It Is Adjudged that the defendant pay a fine unto the United States of America in the sum of $500.00 on each count 1 through 10, making a total of $5,000.00, and upon default of payment of said fines that he stand committed to a panel institution as designated by the U. S. Attorney General until the payment of said fines or until discharged by due process of law. Fines to be paid within a period of ninety days.

It Is Ordered That the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment to the defendant.

Emett D. Choate, United States District Judge.

[fol. 23]

IN UNITED STATES DISTRICT COURT

ORDER DISMISSING COUNTS 11, 12, 13, 14, AND 15 OF INDICTMENT HEREIN—December 6, 1957

This cause coming on before me to be heard upon motion of the United States of America by and through its Assistant United States Attorney, for an order of dismissal as to Counts 11, 12, 13, 14 and 15 of the indictment filed herein, and the Court being fully advised in the premises, it is

Ordered and Adjudged that said motion is hereby granted and Counts 11, 12, 13, 14 and 15 of the indictment are hereby dismissed.

Done and Ordered at Miami, Florida, this 6th day of December, 1957.

Emett C. Choate, United States District Judge.

Motion

Comes now the United States of America, by and through its Assistant United States Attorney, and respectfully moves entry of the foregoing Order.

James L. Guilmartin, United States Attorney, By O. B. Cline, Jr., Assistant U. S. Attorney.

In United States District Court

Transcript of Sentence Proceedings Filed in Case No. 10,348-M-Cr.—Filed December 10, 1957

[fol. 24] Miami, Florida
December 6, 1957

Sentence Proceedings

Before: Hon. Emett C. Choate, United States District Judge.

For the Government: O. B. Cline, Asst US Attorney

For the Defendant: Ernest Roberts Esq.

The Court: As respects to the last five counts, I granted a new trial?

Mr. Cline: Yes, sir.

The Court: Dr. Needelman, do you have anything to say before sentence is pronounced against you?

Mr. Roberts: Judge, I would like to say a word on his behalf.

The Court: Yes, Mr. Roberts.

Mr. Roberts: I don't have to tell Your Honor that while we realize that the jury has passed on Dr. Needelman's guilt, as far as the world is concerned, he is guilty, I am sure that I do not have to tell Your Honor that Dr. Needelman feels that what he did was not in violation of any of [fol. 25] the laws of the United States. However, as I say, we know that the jury has passed on that, and Your Honor has passed on at least ten counts of the indictment; and in the passing of this sentence I know Your Honor is going to take into consideration Dr. Needelman's profession, what he has suffered so far in this case, and what he will suffer the rest of his life. What with attorney's fees and costs of the Court, the witness's fees and professional fees, the time that he has had to lose in his profession in the preparation of the trial of this case, it has cost him well over $10,000.00. He is going to be deprived of his medical license, and his ability to earn a livelihood for his wife and his two children; and I bring that to Your Honor's attention in the imposition of any sentence.

The Court: The Medical Association may or may not deprive him of his license. I hope they don't. I hope they think he should not be deprived of his license because undoubtedly he is a skilful Doctor. I don't know. I am not going to go back on the jury's verdict, but I personally feel that he was exceedingly careless in any event, and it is possible that the jury felt that way and found him guilty for that reason. I don't know. They shouldn't have on that basis, but being human beings they might have done so.

As I said before, I appreciate the fact that a professional man is terrifically punished by a conviction, or even by a charge, as far as that is concerned.

[fol. 26] Do you have anything else to say?

Mr. Roberts: That's all.

The Court: Dr. Needelman, do you want to say something?

The Defendant: No, sir.

The Court: Dr. Harry Needelman, the jury having found you guilty of the charges contained in each of the counts numbered 1 through 10 respectively of the indictment filed against you in case No. 10,348-M-Cr., and the Court having heretofore adjudged you guilty of those charges, the Court

now finds and adjudges you guilty of those charges; and it is the judgment of the Court and the sentence of the law, that you, Harry Needelman, be remanded to the custody of the Attorney General of the United States, or his authorized representative, to be imprisoned in a penal institution of the United States, for a period of two years on each of said charges, and that you pay a fine unto the United States of America in the amount of $500.00 on each of said charges, and upon failure to pay such fine you stand further committed to the custody of the Attorney General of the United States until payment of said fine, or until otherwise discharged in due course of law.

The terms of imprisonment are to run concurrently; and [fol. 27] the sentence of confinement in this case on each count is suspended, and you are placed upon probation with the Probation Officer of this Court for a period of three years under the standing conditions of probation as outlined in the Court's Order dated December 1, 1939, imposing standing conditions of probation.

Privilege of paying said fine over a period of ninety days is granted; so you can make arrangements to pay the fine, which means a total of $5,000.00.

Mr. Roberts: He, of course, will be released. He is not in custody, as I understand, Your Honor?

The Court: Well, now he is not in custody, be he is on probation at this moment. Now Doctor, remember that if you do violate the laws in any way, shape, or form, you are facing a ten year sentence. I do that for the reason that I still believe that perhaps you were just careless.

(Discussion as to Bond and payment of fine.)

The Court: I understand that you are going to nolle pros the five counts?

Mr. Cline: Yes, sir.

The Court: I think that is proper because I don't see how [fol. 28] the Court could convict him on those five counts in view of the testimony of the other Doctor. At the time I thought there was some reason to let it go before the jury, because the other Doctor said those dosages were too large in his opinion. They were unusually large, let's say that.

Certificate of Reporter (omitted in printing).

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed December 10, 1957

Name and Address of Appellant: Harry Needelman, 310 East DiLido Drive, DiLido Island, Miami Beach, Florida. Name and Address of Appellant's Attorney: Ernest E. Roberts, 1401-5 Metropolitan Bank Building, Miami, Florida.

[fol. 29] Offense: Violation of Narcotic Law (26 USC 4705 (a)) ten counts. Concise Statement of Judgment and Sentence: Defendant adjudicated guilty on first ten counts of the indictment and sentenced on December 6, 1957 to two years confinement on each count, together with fine of $500.00 on each count; sentences to run concurrently and service of said sentence withheld and defendant placed on probation for a period of three years. Defendant allowed ninety days within which to pay fine.

Name of Institution where now confined, if not on bail: Not confined.

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the Fifth Circuit from the above-stated judgment.

Dated: December 10, 1957.

Ernest E. Roberts, Attorney for appellant.

Certificate of service (omitted in printing).

[fol. 31]

IN UNITED STATES DISTRICT COURT

Transcript of Trial Proceedings Filed in Both Cases on March 10, 1958—Filed: March 10, 1958

The above entitled cases came on for hearing before the Hon. Emett C. Choate, US District Judge, and a jury duly and regularly sworn and empanelled to try the same in open Court, on November 13, 14, 18, 19 and 20 1957.

APPEARANCES:

O. B. Cline, Asst US Attorney, appearing on behalf of the Government.

Dan Chappell Esq., appearing on behalf of the Defendant, Waxman.

Ernest Roberts Esq., appearing on behalf of the Defendant, Needelman.

[fol. 36] Miss Sally Rossman was called as a witness on behalf of the Government, having first been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Cline:

Q. Will you state your name, please?
A. Miss Sally Rossman.
Q. Where do you live, Miss Rossman?
A. 4455 Prairie Avenue on the Beach.
Q. By whom are you employed?
A. I beg your pardon?
Q. By whom are you employed?
A. Mount Sinai Hospital.
Q. Where were you employed during the period August 6, 1955 through September 23, 1955?
A. By Doctor Harry Needelman.

The Court: That is Doctor Needelman sitting there at the table, is that right?
The Witness: Yes, sir.

By Mr. Cline:

Q. Do you recognize him?
A. Yes.
Q. Point him out, please.
[fol. 37] A. The first gentleman in the blue suit.
Q. How long were you employed by Dr. Needelman?
A. From I believe, the beginning of June until sometime in November of that year.
Q. June through November of 1955. Is that correct?
A. Yes, sir.
Q. What was your capacity in the employ of Dr. Needelman? What were your duties?

A. I was principally doing lab work, assisting the Doctor and covering the front desk when needed.

Mr. Cline: Your Honor, these exhibits have markings on them, and with the Court's permission, I will have those markings for identification.

The Court: All right. You have no disagreement with that, Mr. Roberts?

Mr. Roberts: No, sir.

(Thereupon, the instruments were marked for identification as Government's Exhibits 1 through 31.)

By Mr. Cline:

Q. Miss Rossman, I hand you Government's Exhibits 1 through 31 for identification and ask you if you can identify those exhibits?

A. Identify them in what way? What do you want me to do?

[fol. 38] Q. Have you ever seen them before?

A. Yes.

Q. Do you recall when and where?

A. At the time of my employment with Dr. Needelman at the office.

Q. Is there any writing on any of these documents that you recognize as your own?

A. Yes, sir.

Q. What is the writing that you recognize?

A. Glancing through them quickly, "To be filled." I can see where it is my handwriting.

Q. Is there anything else on these documents that you recognize with your own handwriting?

A. There are dates. That is also mine.

The Court: You mean the words, "To be filled" on a certain day appear in your handwriting?

The Witness: Yes. Some of the dates were filled in by me, yes, sir.

The Court: Some of them?

The Witness: Yes, sir.

By Mr. Cline:

Q. Now, on these I want you to make sure whether it is your handwriting after the words. "To be filled" on each [fol. 39] of these exhibits, 1 through 31 for identification which you have in your hand, if you will, please.

A. There are a few that I cannot say for sure at this time.

Q. Will you please tell us those that you do know for sure are your writing?

A. This one I am not sure of.

The Court: What is that number?

Mr. Cline: 14.

By Mr. Cline:

Q. What part of it is it that you are not sure is yours?

A. The "8-12—55." It may be. I am not sure. And also this one.

The Court: What is the number of that?

Mr. Cline: No. 5.

The Witness: "9—21—55." The rest of them I think are mine.

(Thereupon the Court was adjourned until 1:45 P.M. of the same day, at which time the following proceedings took place.)

[fol. 40] By Mr. Cline:

Q. Are you the same lady that was on the witness stand this morning?

A. Yes, sir.

Q. In relation to Government's Exhibits 1 through 31 for identification shown to you, which you identified this morning, did you ever have any conversation with Dr. Needleman regarding these exhibits for identification?

A. What do you mean, as far as conversation?

The Court: Did you ever talk to him about them.

The Witness: Yes.

By Mr. Cline:

Q. Do you recall approximately when that was?

A. Prior to the Doctor's leaving.

Q. Approximately how long before he left?

A. I imagine it was within a week or ten days.

Q. Do you recall the approximate day Dr. Needelman left?

A. About August 6th.

Q. Now, where did that conversation take place?

A. In the office.

Q. In your office?

A. In Dr. Needelman's office.

Q. Who else besides yourself, if anyone, and Dr. Needelman was present?

[fol. 41] A. To my recollection, Miss Fredericks was also there, the other nurse in the office.

Q. I realize it has been sometime ago, but I wish you would to the best of your ability recall that conversation what you said and what Dr. Needelman said, and what instructions, if any, you received regarding these exhibits.

A. To the best of my recollection, the prescriptions were left and they were to be located in a drawer of the desk which was to my knowledge the only thing in the office itself which was under lock and key, and when the patients whose names appeared on the prescriptions came in they were to be their prescriptions.

Q. What were you to receive in exchange for these prescriptions, if anything?

A. A fee.

Q. What was the amount of that fee?

A. Well, that depended. There were different fees.

Q. Do you recall the approximate amount?

A. I believe that they varied—five or ten dollars.

Q. Do you recall dispensing any of these so-called prescriptions?

A. You mean giving them out?

Q. To the person named on them?

A. Yes.

Q. Will you relate, as best you can recall, what took [fol. 42] place in any conversation that you may have had. What took place and what did you do?

A. A patient would come in and in dealing with patients you get to know them by name, and the patient would come in and pay for their prescription and they would be given their prescription.

Q. And at that time you did what, as far as writing on them, anything?

A. The date that they came in would be filled in on the prescription.

Q. What, if anything, would they give you in return for this?

A. A fee.

Q. What did you do with that fee, if anything?

A. It was entered in the day book and the money was put into this locked drawer where we kept the money under lock and key.

Q. Do you know a Gerald Miller?

A. The name is familiar. I don't know today that I could put a face on it.

Q. Do you recall Fidele Garcia?

A. Just the name again.

Q. How about Harold Sachs?

A. The name, again, is familiar.

Q. How about Alice Buononito?

[fol. 43] A. Yes.

Q. How about Renee Pollack?

A. Yes.

Q. Where do you recall those names from?

A. Those are the names of patients that we saw at Dr. Needelman's office.

Q. Do you recall any of those named persons coming to the office of Dr. Needelman during that period from August 6th through September 23, 1955?

A. Yes.

Q. Do you recall if they all did at one time or another?

A. That I cannot say for sure. I was on vacation part of the time.

Q. Now, I believe the exhibits that you have had in your hand you have identified as saying that you wrote the words, "To be filled," and the date. Is that correct?

A. Yes, sir.

Q. What does that indicate to you that you did with these exhibits when the patient came in the office, if anything?

A. I don't understand your question. You say what did I do? I wrote the dates on them and the words, "To be filled".

Q. When did you write the dates on them? What occasioned you to write the second date?

A. It was the day the patient came in, the day the prescription was to be filled.

[fol. 44] Q. Who, if anyone, was present in the office when you gave these exhibits to the persons named on them?

A. Who was there besides myself?

Q. Yes, that's right.

A. Some of the time Miss Fredericks was also there and at times Dr. Szekely, and at times Dr. Grier was there.

Q. In the same room at the time you gave these exhibits out?

A. I couldn't say.

Q. When these persons named on these exhibits came to the office and you gave them these exhibits that you have identified here, did they see or have any conversation with anyone else, as a general rule?

A. Not necessarily.

Q. Now, I have here Government's Exhibits 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48—

Mr. Chappell: Your Honor please, in order to keep the record straight at this time I am going to object and move to strike all of this witness' testimony to date as it might affect the defendant Waxman.

The Court: I will overrule the objection and deny the motion without any prejudice to you, moving to strike it at a later date.

[fol. 45] Mr. Chappell: No evidence was offered or any predicate laid that he was present or that any of this stuff took place in his hearing or that he had any knowledge of it, and it cannot be binding on him.

The Court: The charge is conspiracy, and if the conspiracy is proven, as you know, then certain evidence may be admitted.

Mr. Chappell: If he is going to prove conspiracy he should prove conspiracy.

The Court: If he doesn't you move to strike it.

By Mr. Cline:

Q. Government's Exhibit 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62 and 63 for identification, and I ask you if you can identify or recognize these exhibits.

A. Again, some of them have my handwriting on them.

Q. Do you see any that you definitely do not feel to be in your handwriting?

A. Yes, sir.

Q. Will you please pull those out?

A. There is four.

Q. The four that you say do not appear to contain any writing of yours are Government's Exhibits for identification 45, 54, 62 and 63. Is that correct?

A. I didn't take the numbers, but I take your word for it.

[fol. 46] Q. Agreed?

A. Yes.

Q. Now, all of the others being exhibits 35 through 61 for identification do contain some handwriting of yours. Is that correct?

A. Yes, sir.

Q. What is written, or what did you write on these slips?

A. I wrote the words, "To be filled," and also some of the dates on them.

Q. Which dates? There are two dates, I believe.

A. The date 8-6-55 and some the dates following the words, "To be filled" are also mine. Not all of mine, but some of them.

Q. Who, if anyone, instructed you to write the words "To be filled" on these slips?

A. To the best of my knowledge, I believe Dr. Needelman said to.

Q. What are all these slips you have been talking about? Do you know what they are?

A. Prescriptions.

Q. Who signed these prescriptions, if anyone?

A. Dr. Needelman.

* * * * * * *

[fol. 72] Redirect examination.

By Mr. Cline:

. . . . . .

[fol. 75] Q. Now, Mr. Roberts asked you awhile ago concerning the custom that was followed, when the patient came in the office and that you took those cards, or a part of them, at any rate, into the Doctor before the patient went into the Doctor's inner office. Is that correct?

A. Yes.

[fol. 76] Q. And when they finished the visit they brought those out. Now, as regards Gerald Miller, Fidele Garcia, Harvey Sachs, Alice Buononito and Renee Pollack, was that procedure followed between August 6th and September 23rd, 1955?

A. No, it wasn't.

Q. Now, I wonder in this cash book here, being Defendant's Exhibit 1 for identification, if you could tell me what these "F's" and "R's" in color opposite and to the left of the patient's name means? Do you know what that is and what it represents?

A. I never saw the "R's" and "F's" before today.

Mr. Roberts: They have been put on to help the witness locate certain names, so we wouldn't spend an hour going through. We tried to facilitate the matter. The "R" is what we believe is in the witness' handwriting and the "F" is what we believe is in Miss Fredericks' handwriting.

The Court: You stated a minute ago that the usual procedure was not followed in the case of those exhibits that counsel asked you about. What procedure wasn't followed?

The Witness: If they asked particularly to see the Doctor due to something either related or unrelated to the receiving of their prescriptions, they were naturally sent in [fol. 77] to see the Doctor and the treatment card would be pulled, but if they were coming in for the purpose of their prescription, the whole procedure was done away with. Their card would not be pulled and put on the Doctor's desk and ushered in.

The Court: In other words, they would just see you, if you were on duty?

The Witness: That is right.
Mr. Cline: That's all.

By Mr. Roberts:

Q. Do you know of any occasion—

Mr. Cline: Just a moment. I know of no recross examination.
The Court: I asked a question and he can cross on that.

Recross examination.

By Mr. Roberts:

Q. Do you know of any occasion when Dr. Needelman was there that they have got a prescription without seeing the Doctor?
A. There was no way for them to get a prescription without seeing the Doctor. The Doctor had to write it.

Mr. Roberts: Fine. That's all.

By Mr. Cline:

Q. You say there was no way to get a prescription un- [fol. 78] less they saw the Doctor? That is before he went to Europe, that was in effect when he was in Europe, was it?
A. No; before he went to Europe, naturally, there weren't any prescriptions at the desk.

By Mr. Roberts:

Q. Before he went to Europe he never left any prescriptions out in front for anybody?

The Court: She just said that.
Mr. Roberts: I did not hear it.
Mr. Cline: Thank you.

[fol. 80] LILLIAN FREDERICKS was called as a witness on behalf of the Government, having first been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Cline:

Q. Will you state your name, please?
A. Lillian Fredericks.
Q. Where do you live?
A. 1910 71st Street.
Q. Miami Beach?
A. Normandy Isle.

The Court: I think it can be agreed that Miss Fredericks worked in this Doctor's office at the same time that we are concerned about and she is the Miss Fredericks mentioned by the last witness.

Mr. Roberts: Yes, sir.

[fol. 81] The Court: You so agree. Is that correct?

Mr. Cline: Yes, sir.

Mr. Chappell: Yes, sir.

By Mr. Cline:

Q. You know Dr. Needelman, of course, and recognize him. Is that correct?
A. Yes.
Q. Now, who else worked in the office with you at the time you were employed there in August and September, 1955?
A. Sally Rossman.
Q. Were there any other employees in Dr. Needelman's office except you and Miss Rossman, and, of course, Dr. Needelman?
A. You mean the doctors?
Q. Anyone else at all in my capacity.
A. Doctors Grier and Szekely.
Q. Were they both there at the same time?
A. I believe the first two weeks they were both there at the same time.

Q. When you refer to the first two weeks, you refer to what period?

A. The time of Dr. Needelman's vacation.

Q. The first two weeks Dr. Needelman was in Europe there were both Doctor Grier and Doctor Szekely?

A. Yes.

[fol. 82] Q. And after that who was there?

A. After that just Dr. Szekely.

Q. Just Dr. Szekely. Before Dr. Needelman left on his vacation did you have any conversation with him concerning so-called prescriptions?

A. Yes, sir.

Q. Do you recall approximately when that was, as near a date as you can get?

A. I cannot recall.

Q. In relation to the time that the Doctor went away, approximately how long, as close as you can recall?

A. I am afraid I cannot recall that.

Q. Would it be a month or a week or would it be a matter of possibly days?

A. Probably a few days prior to it.

Q. Who was present during that conversation as best you can recall?

A. Miss Rossman and I were present.

Q. With Dr. Needelman?

A. I believe so.

Q. Was anyone else present that you recall?

A. I cannot recall.

Q. Now, as best you recall, once again, what was the nature of the conversation? What did Dr. Needelman have to say and what did you have to say and what did Miss [fol. 83] Rossman have to say, as best you can remember?

A. He gave us instructions.

Q. What was the nature of those instructions?

A. Well, how to handle the cash and how to handle the various prescriptions.

Q. Now, do you know Abe Bruches?

A. Yes.

Q. Do you know Lottie Bruches?

A. Yes.

Q. Do you know Gerald Miller?

A. Yes.

Q. Fidele Garcia?

A. Yes.

Q. And Harvey Sachs?

A. Yes.

Q. And Alice Buononito?

A. Yes.

Q. How about Renee Pollack?

A. Yes.

Q. Do you recall those persons being in Dr. Needelman's office during the period of your employment?

A. Yes.

Q. Do you recall them going to the office when Dr. Needelman was on his vacation?

A. Yes, sir.

[fol. 84] Q. Do you know from your own personal knowledge the nature of the ailment that they were calling on the Doctor about?

A. No, sir.

Q. Now, at this time I show you Government's Exhibits 35 through 63, inclusive, and ask you if you can identify them in any manner.

A. Yes.

Q. When did you first see them, if you recall?

A. Pardon?

Q. When did you first see these slips of paper, if you recall?

A. When they were left with us.

Q. By whom?

A. Dr. Needelman.

Q. What conversation, if any, took place at that time you say he left those with you? Did he leave any instructions of any kind?

A. Yes. We were to keep them in the drawer of the desk.

Q. What were you to do with them?

A. To give them to the patients.

Q. What portion of those slips was filled out at the time they were given to you by Dr. Needelman?

A. Well, I believe everything was filled out except the date and "To be filled."

Q. Now, these words, "To be filled" and the dates, who [fol. 85] completed those, if you know?

A. Well, I believe Miss Rossman. I know I didn't put any "To be filled."

Q. What, if any, writing on these slips that you have in your hand now is your own, if you know.

A. Some of the dates.

Q. Will you check and see if all or a portion of the slips that you have in your hand, have the dates that were inserted by yourself?

A. I cannot seem to recall—

Q. When did you fill them in, if you recall?

The Court: What circumstances arose that caused you to fill them in?

The Witness: I had the patient that would come in.

By Mr. Cline:

Q. In other words, that second figure would indicate the date that this slip of paper was handed to a person that came in the office; is that right?

A. Yes.

Q. As best you can recall, to the best of your recollection, what took place when one of those pictures—take Exhibits 35 for identification, if you will, and the name, Fidela Garcia which appears on there—what took place in the office when that was issued? What did Garcia do if he came in?

[fol. 86] A. Why, he would come in and ask for a prescription.

Q. Who did he talk to when he came in the office?

A. You mean what, all the time, or when the Doctor was present?

Q. As a general rule, during the period August 6th through September 23?

A. I guess he spoke to me.

Q. Now, would he have talked to Dr. Szekely?

A. Not on all occasions.

Q. On most occasions would he have talked to either Dr. Grier or Dr. Szekely?

A. No.

Q. What did you receive, if anything, from Mr. Garcia or the other persons whose name appear on these slips in exchange for these slips of paper?

A. Well, I believe there were various fees.

Q. Do you recall the amounts?

A. Some were five dollars and some were ten dollars, I believe, as far as I can recall.

Q. Who set these fees?

A. Dr. Needelman.

Q. Your conversation with Dr. Needelman, he indicated the fee that was to be charged to each of the patients; is that correct?

A. Those were the regular fees that we were acquainted with.

[fol. 87] The Court: You said some were five dollars and some were ten dollars, as I recall.

By Mr. Cline:

Q. How did you distinguish between who was a five dollar patient and who was a ten dollar patient?

A. By their previous records, I believe.

Mr. Cline: Your witness.

* * * * * * *

[fol. 115] BERNICE SACHS was called as a witness on behalf of the Government, having first been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Cline:

Q. State your name, please.

A. Bernice Sachs.

Q. Where do you live, please?

A. 8420 Byron Avenue.

Q. Where are you employed?

A. The Medical Arts Pharmacy.

Q. How long have you been employed by the Medical [fol. 116] Arts Pharmacy?

A. Close to four years.

Q. You were so employed during the months of August and September of 1955. Is that correct?

A. Yes, sir.

Q. Do you know Walter Waxman, the defendant in this case?

A. Yes, sir.

Q. Would you point him out, please?

A. The second man to my left (indicating the defendant, Walter Waxman).

Q. Was he the owner and operator of the Medical Arts Pharmacy when you were first employed there?

A. Yes, sir.

Q. Is he still your employer at this time?

A. Yes, sir.

Q. And has he been your employer continuously between those periods?

A. Yes, sir.

Q. Do you have any financial interest, that is in ownership, in Medical Arts Pharmacy?

A. No, sir.

Q. Do you work on a commission or do you work on a straight salary?

A. Straight salary.

Q. And have you worked on a straight salary and had no [fol. 117] ownership in the business continuously during the four year period you have been employed there?

A. Yes, sir.

Mr. Cline: At this time I am going to offer Government's Exhibits 64 through 138 for identification.

Mr. Chappell: When were they put in?

Mr. Cline: They are for identification. These are new ones. 64 through 138 for identification.

(Thereupon said documents were marked Government's Exhibits 64 through 138 for identification.)

Q. I ask you if you have ever seen any of these before.

A. Yes, sir.

Q. How do you recognize these—what do you recognize these as?

A. Prescriptions.

Mr. Chappell: I object to "what do you recognize these as". The writing is the best evidence. It is apparent they are in writing.

The Court: She can identify if she has seen the papers before, and if so, where?

[fol. 118] By Mr. Cline:

Q. Where have you seen these papers before?

A. In the drugstore.

Q. What do they purport to be, to the best of your knowledge?

A. Narcotic prescriptions.

Q. Will you please distinguish which ones of these you personally filled? Put the ones you personally filled in a stack, if you will. As you go through tell us, if you will, if there are other groups that you can segregate.

A. In what respect?

Q. Exhibit 131. You have got that in a separate file. What would that be?

A. It was filled by Bill Morris.

Q. What about 138, 137 and 132? You have those separated?

A. Filled by Mr. Waxman.

The Court: That is Mr. Waxman, the defendant, who is in the courtroom here?

The Witness: Yes, sir.

By Mr. Cline:

Q. 130, 129, 128, 127, 121, 122, 123, 124, 125, 126, 120, 119, 118, 117, 116, 115, 114, 113, 112, 111, 110, 109, 109, 104, 105, 106, 107, 95, 96, 97, 98, 99, 100, 101, 102, 103 and 90, 91, 92, 93, 94, 84, 85, 86, 87, 88, 89, 82, 83, 81, 80, and 79. This group represents what?

A. Mr. Kamisarow.

[fol. 119] Q. Who is Mr. Kamisarow?

A. He is another pharmacist. He was working there at the time.

Q. 133, 78, 75, 74, 76, 77, 72, 73, 71, 70, 69, 68, 67, 66, 65 and 64. I wonder if you will take these and tell what group these belong to?

A. These are mine.

Q. These were filled by you?

A. Yes.

Q. As an employee of Mr. Waxman at the Medical Arts Pharmacy. Is that correct?

A. Yes.

Q. How about 134, 135 and 136?

A. It is Mr. Kamisarow again.

Q. Those are also by Mr. Kamisarow?

A. Yes, sir.

Q. I wish you would examine all of these exhibits and tell me what they have in common.

Mr. Chappell: I object to that because the writing is the best evidence.

The Court: They speak for themselves. Objection sustained.

The Witness: They are all narcotics.

[fol. 120] Mr. Chappell: Just a minute.

Mr. Cline: That's all right.

The Court: She has testified to that before.

By Mr. Cline:

Q. Did you ever have any conversation with Mr. Waxman regarding that particular group of so-called prescriptions?

A. Not that I remember.

Q. Do you know Abe Bruches?

A. Yes.

Q. Do you know Lottie Bruches?

A. Yes, sir.

Q. Did you see them often?

A. Yes, sir.

Q. Did you see them often during August and September, 1955?

A. Yes, sir.

Q. During that period August 6th through September 23, 1955 what, if anything, did you do regarding so-called prescriptions brought in by Mr. and Mrs. Bruches, or requested by them?

A. I filled them.

Q. Where did you get the prescriptions from?

A. From the safe.

[fol. 121] Q. From the safe? What safe?

A. We have a safe in our drugstore.

Q. What did you receive, if anything, from Mr. and Mrs. Bruches in exchange for these so-called prescriptions?

A. Two dollars.

Q. What did you do with them?

A. Rung them up in the register.

Q. What was it for?

A. For the pills I gave them.

Q. I ask you what you received in exchange for the prescription. I am not talking about the bottle of pills that you gave. I am talking about a piece of paper.

A. I don't understand.

The Court: Did you get any other conversation except that for the pills, the regular cost of the pills?

By Mr. Cline:

Q. From Mr. and Mrs. Bruches.

A. No, that's it.

Q. When the Bruches came into your place of business did they have these in their hands?

A. No, sir.

Q. Was that the usual way of filling prescriptions, coming and getting it out of the safe?

A. The usual way, no, sir.

Q. How did you happen to know that these were in the safe? How did they get in there, if you know?

[fol. 122] A. I was told.

Q. By whom?

A. I don't remember exactly who told me.

Q. Did you have any conversation with Mr. Waxman regarding these prescriptions that were in the safe?

A. Probably. I don't remember.

Q. Did you have any conversation with Mr. Kamisarow regarding it?

A. Probably.

Q. Did you receive any money for Dr. Needelman from the Bruches on these so-called prescriptions?

A. Sometimes, yes, sir.

Q. What did you do with it?
A. I put it away.
Q. Where, do you recall?
A. In a separate envelope.
Q. Where was the envelope kept?
A. In the safe.
Q. Was there anything besides money in that envelope?
A. No; money.
Q. Pardon?
A. Just the money.
Q. Where was that envelope kept in relation to the other unused so-called prescriptions?
A. They were both in the safe.
[fol. 123] Q. But in separate envelopes, is that right?
A. Yes, sir.
Q. What was specifically done with that money, if you know?
A. That I know?
Q. That's right.
A. The money was given to Dr. Needelman.
Q. Did you see that take place?
A. No, sir.

Mr. Roberts: I move to strike the answer of the witness and ask the Jury be instructed to disregard it.

Mr. Cline: I think Mr. Roberts is correct, in view of her answer.

The Court: Did you ever have any conversation with Dr. Needelman about money?

The Witness: No, sir.

The Court: He didn't say anything to you or in your presence?

The Witness: No, sir.

The Court: The motion will be granted.

[fol. 124] Mr. Roberts: I think the jury should be instructed to disregard it.

The Court: The jury is instructed to disregard it. I think you said something in your opening statement.

Mr. Roberts: Yes, but not an inference that the Government is trying to get across to the jury.

The Court: There is no inference except the inference the jury is going to make. Our discussions, gentlemen of the jury, if I say anything about the evidence or rulings, it has no inference. It is merely an admonition at the moment as to something that is at present before me.

By Mr. Cline:

Q. At this time I show you Government's Exhibits 1 through 63 and ask you if you can identify any of these.
A. Yes, I can identify them.
Q. What do they appear to be, if you know?
A. Narcotic prescriptions.

Mr. Chappell: I object to that.
The Court: What do they appear to be, if she knows. Do you know what they are?
[fol. 125] The Witness: Yes, sir.
The Court: What are they?
The Witness: Narcotic prescriptions.

By Mr. Cline:

Q. Can you tell where they were filled?
A. My drugstore.
Q. By whom?
A. By me, by Mr. Kamisarow and by Mr. Waxman. I guess that's it.

Mr. Cline: Your witness.

* * * * * * *

[fol. 141] Thereupon, the testimony of DAVID KAMISAROW was read as follows, the questions being read by Mr. Cline [fol. 142] and the answers being read by Mr. Rudd.

Direct examination.

"By Mr. Rosen:

"Q. State your name, please.
"A. David Kamisarow.
"Q. Where do you live, Mr. Kamisarow?
"A. 7727 Dickens Avenue, Miami Beach.
"Q. What is your business or profession?
"A. Registered pharmacist.

"Q. Where are you located?

"A. I am now located on Lincoln Road.

"Q. Your own store?

"A. Yes, sir.

"Q. During August and September of 1955, where were you employed?

"A. Medical Arts Pharmacy.

"Q. Who was your employer?

"A. Walter Waxman.

"Q. Do you recognize him here?

"A. Yes, sir.

"Q. Point him out, please.

"A. Sitting at the end of the table.

"Mr. Rosen: Let the record reflect the identification of the defendant Waxman.

"Q. Now, then, Mr. Kamisarow, I hand you a group of documents marked for identification, each one bearing a separate identification number, and I ask you to go through [fol. 143] them and pick out, and as you pick it out read out the number shown on the identification, any one of those that bear your signature or that bear any of your handwriting or notations that you can.

"A. Do you want me to call this number that is on the small paper?

"Q. Yes, sir.

"A. 39, 41, 44, 45, 46, 55, 56, 57, 59, 2, 3, 4, 5, 9, 10, 12, 36, 15, 18, 20, 22, 21, 23, 26, 27, 30, 32 and 34.

"Mr. Rosen: Will the Clerk please mark these Government's Exhibits 79 through 130."

Mr. Chappell: I will have to raise an objection to that.

Mr. Cline: I am not offering them now.

("The prescription forms were thereupon marked, respectively, Government's Exhibits 79 through 130 for identification.)

"By Mr. Rosen:

"Q. The ones that you have identified, are those ones that you have filled yourself?

"A. Yes, sir, bearing my initials.

"Q. There are some in here that do not bear your initials?

"A. No; I tried to separate them.

"Q. Then, all of these you have called off bear your initials as having been filled by you?

[fol. 144] "A. Yes.

"Q. Using any one of them as an example, will you describe to the Court and the jury, please, what you mean by filling.

"A. Filling, when we receive a prescription we look at it to see what the items or ingredients are; we go to the—in this particular case it would pertain to a safe, the only place where these items are kept, because of certain restrictions, take the bottle to our counter, count out the required number of pills or weigh the ingredients, where it is prescribed; in this case it would be counting the pills, using the directions that the physician has put on to put on the label, and this label is put on a glass or a plastic container, wherein the pills are, and that is given to the patient.

"Q. What do you receive in exchange for the medication?

"A. A price for the prescription that we give the patient.

"Q. You receive nothing else but the money?

"A. I don't understand what you mean.

"Q. Well, in the case of the Bruches—did you handle any of these documents for the Bruches?

"A. Yes.

"Q. What did you receive from the Bruches in exchange for the medication?

"A. We received the fee for the prescription itself, for the ingredient called for or the tablets called for, and at [fol. 145] different times moneys were left, which we put aside, which was—which we understood was for the old bill they owed the Doctor, and it was a chance to pay off that way. Shall I say it that way? There was no definite amount on it.

"Q. What did you do with the money you received for the Doctor?

"A. That money, you mean?

"Q. Yes.

"A. That was put in an envelope and put aside.

"Q. When the other parties came in with these documents whose names appear on these documents, other than the piece of paper and money, did you receive anything else from these people?

"A. No, sir.

"Q. You followed the same procedure with each one of those?

"A. Yes, sir.

"Mr. Rosen: At this time I should like to offer into evidence the documents bearing the identification numbers that Mr. Kamisarow identified into evidence with those numbers, bearing corresponding exhibit numbers.

"Mr. Kehoe: No objection on behalf of the defendant Waxman.

"The Court: Mark them in evidence.

[fol. 146] (The prescription forms were thereupon received in evidence and marked, respectively, Nos. 39, 41, 44, 45, 46, 55, 56, 57, 59, 2, 3, 4, 5, 9, 10, 12, 36, 15, 18, 20, 21, 22, 23, 26, 27, 30, 32 and 34.)

"By Mr. Rosen:

"Q. Now, Mr. Kamisarow, I hand you Government's Exhibits 79 through 130. They have not yet been marked by the Clerk, but they will be bearing that number for identification. I ask you, sir, to examine those and tell me if your initials appear as having filled those documents.

"A. That I am not sure of as being my signature (indicating) that is not my writing.

"Mr. Rosen: Will the Clerk please mark the one the witness says he is not certain of as Government's Exhibit No. 79.

("The prescription form was thereupon marked Government's Exhibit No. 79 for identification.)

"Mr. Rosen: And the others bearing the following numbers.

("The prescription forms were thereupon marked, respectively, Government's Exhibits Nos. 80 through 130 for identification.)

"By Mr. Rosen:

[fol. 147] "Q. Now, please, Mr. Kamisarow, during the time that you were filling these various documents that you have just identified having your handwriting on them, did you know where Dr. Needelman was?

"A. Did I know where he was. No, I didn't know where he was.

"Q. Did Dr. Needelman tell you where he was going?

"A. In the course of conversation, he left for his vacation.

"Q. So, you knew he was out of town at this time?

"A. Yes.

"Q. Using the documents that you have already identified, will you separate them into separate piles relating to the various drugs that they call for.

"Witness does as requested.

"Q. Do you have them separated?

"A. Yes.

"Q. Will you tell me, please, what handwriting of yours appears on this particular one which I am going to ask the Clerk to mark as Government's Exhibit No. 80 for identification?

("The prescription form was thereupon marked Governments Exhibits No. 80 for identification.)

"By Mr. Rosen:

"Q. What handwriting of yours appears on Government's Exhibit No. 80 for identification?

"A. The dates and my initials.

[fol. 148] "Q. The dates and the—

"A. Initialling.

"Q. All the dates that appear on it?

"A. Yes, sir.

"Q. Where did you receive that, if you can recall?

"A. That I couldn't say.

"Q. Did you fill that document?

"A. According to this initialling, I did.

"Q. On what date?

"A. On the 11th of August.

"Q. 1955?

"A. 1955, yes, sir.

"Q. Where were you at that time?

"A. I would have been in the drugstore to have filled it.

"Q. What did you do? We have already described the procedure that you used in filling each one of these papers. I will ask you the same question as to the other two stakes. Were they received by you in the ordinary course of your business?

"A. Yes, sir.

"Q. And filled as you have previously described?

"A. Yes, sir.

"Mr. Rosen: At this time I am going to offer all of them in evidence as Government's Exhibits 80 through 130.

"Mr. Duval: Let me see them."

[fol. 149] Mr. Chappell: Same objection.

The Court: Overruled.

"By Mr. Rosen:

"Q. Now, then, Mr. Kamisarow, I hand you Government's Exhibits 131 through 136, and ask you to examine those documents and tell me if there is any portion of them containing your handwriting.

"A. There is.

"Q. What portion of the document is in your handwriting?

"A. The dates on the upper parts of the prescriptions.

"Q. I ask you to look at Government's Exhibits 80 through 130 and tell me what portion of those documents are in your handwriting.

"A. That signature I don't recognize. My writing is the dates—these are the dates and the initialling, my initials.

"Q. Directing your attention to Government's Exhibit No. 122, the writing opposite the last date appearing on it, 9/4/55, whose handwriting is that?

"A. That is mine.

"Q. What words are they?

"A. To be filled 9/4/55.

"Q. On the others that I pointed out, I ask you to look at the words, "To be filled," and ask you in whose hand-
[fol. 150] writing those words are.

"A. That is mine.

"Q. All of those I handed you there?

"A. Yes.

"Q. Now, then, go through this batch here and as you pick out any having your handwriting and the words 'To be filled,' and the date, will you call out the number of the exhibits.

"A. 77, 68, 76, 69, 71, 72, 73, 67, 74, 75, 78, 65, and 79.

"Q. Now, then, referring to Government's Exhibits for identification 80 through 130, you have divided them into three different types of narcotics. Taking Government's Exhibit No. 80, which you have heretofore identified as having been dispensed by you, tell us the quantities and qualites of narcotic drugs dispensed by you.

"A. The quantities and—I didn't get that second word.

"Q. Quantity and quality.

"A. The quantity and the name of the item?

"Q. All right.

"A. Methadon tablets, 10 milligrams, number, 24 tablets.

"Q. Twenty-four 10 milligram tablets.

"A. Yes, sir.

"Q. Government's Exhibit 81 for identification.

"A. That was for tablets of Demerol, 100 milligrams, number, 24.

"Q. Twenty-four Demerol tablets?

[fol. 151] "A. Yes, sir.

"Q. Government's Exhibits 82 through 130.

"A. That would be this group here (indicating)?

"Q. Yes, sir.

"A. Those were codeine sulphate tablets, one grain tablets, number, 24.

"Q. Twenty-four one grain Codeine Tablets?

"A. Yes, sir.

"Mr. Rosen: Will the Clerk please mark these Government's Exhibits 137 and 138 for identification?

(The two prescription forms were thereupon marked, respectively, "Government's Exhibits No. 137 and 138 for identification.")

"By Mr. Rosen:

"Q. How long have you been employed by Walter Waxman at the Medical Arts Pharmacy?

"A. The total time?

"Q. Yes, sir.

"A. From about November, 1953, until May of 1956.

"Q. And your position there was a pharmacist?

"A. Yes, sir.

"Q. What procedure was there for a pharmacist filling a particular document or prescription, that is, initialling or cancelling or identifying?

"A. Pertaining to a narcotic prescription or an ordinary [fol. 152] prescription?

"Q. Narcotic prescription.

"A. The procedure followed, as I explained before, in taking the tablets, the pills, or the compounding of the type that is called for, labelling and initialling when completed, and then dispensing to the patient.

"Q. Initialling the paper that you received?

"A. Yes, sir. Cancelling is the word that we use.

"Q. There is an 'X' that goes across it and the initialling by the filling pharmacist?

"A. Yes.

"Q. I ask you to examine this group of documents and tell me if, based upon your association and working there, if you can identify the filling pharmacist, and if you can identify them, will you call out the name of the person and the document number.

"A. On each one?

"Q. Yes, sir, on those I just handed you.

"A. No. 25, Mr. Waxman; No. 28, Mr. Morris; No. 31, Mr. Waxman; No. 43, Mr. Waxman; No. 50, Mr. Morris; No. 53, Mr. Morris; No. 61, Mr. Waxman; No. 7, Mr. Waxman; No. 13, Mr. Waxman; No. 14, Mr. Waxman; No. 17, Mr. Waxman; No. 19, Mr. Waxman; No. 24, Mr. Waxman; No. 137, Mr. Waxman; No. 138, Mr. Waxman.

"Q. Of the ones you identified as filled by Mr. Waxman, [fol. 153] how did you identify that?

"A. Because of his particular type of initialling in making that small, which I found out was a little "w" with that circle around it.

"Mr. Rosen: At this time, I should like to offer into evidence as Government's Exhibits bearing the same number as identification numbers, No. 25, 31, 43, 138, 137, 24, 19, 17, 14, 13, 7 and 61."

Mr. Chappell: I want the same objection, your Honor.

The Court: Yes, overruled.

Mr. Cline: I have not introduced these, so offer them at this time, your Honor. That was merely reading off from the transcript.

Cross examination.

(Thereupon Mr. Cline read the questions on cross-examination and Mr. Chappell reads the answers:)

"By Mr. Kehoe:

"Q. How long have you been a registered pharmacist under the laws of the State of Florida?

"A. Since 1949.

"Q. You went to work at Mr. Waxman's pharmacy at what time?

"A. 1953.

"Q. What has been your experience at any time prior to August of 1955 for prescriptions coming to you through the [fol. 154] regular course of business with the notation, 'To be filled,' and the date inserted thereon?

"A. You mean what were my orders?

"Q. What has your experience been as to receiving prescriptions with that notation on there?

"A. I don't recall any before that.

"Q. I hand you Government's Exhibit No. 80. What handwriting on there is yours?

"A. The dating and the initialling.

"Q. What dating?

"A. '8/6/55' and '8/11/55'.

"Q. Under what circumstances did you put that writing on that prescription?

"A. You mean when it was given to me originally?

"Q. Yes, sir.

"A. At the time the Doctor brought the prescriptions to the store, and being in charge that morning with Mrs. Wax-

man, I asked how—well, I don't recall that I asked, but it was told to me that these were to be filled only on the dates marked, never more than one a day, and then by writing that date in, it would be a prescription.

"Q. You wrote that on there under the direction of Dr. Needelman?

"A. That is right. There would have been no other way for me to know that.

[fol. 155] "Q. I hand you now Government's Exhibit No. 81. On this prescription what handwriting is in your hand?

"A. Again, the dates, 'To be filled,' and my initialling.

"Q. That prescription is to whom?

"A. Renee Pallon.

"Q. I hand you Government's Exhibits 83 to 130, and ask you what writing on those prescriptions are in your hand.

"A. On each, as I call them, or as a group?

"Q. As a group. Is there any of your handwriting on Exhibit 130?

"A. My initialling and the prescription number.

"Q. Look at the others.

"A. The writings, 'To be filled' are mine, and the initialling are mine, except in the case of No. 122, which I think I questioned before as not being my initialling. The writing is mine.

"Q. The '8/6/55' is yours?

"A. Yes, sir.

"Q. And 'To be filled' is yours?

"A. Yes, sir.

"Q. But the initialling here, you can't say whether it is yours or not?

"A. Yes.

"Q. Under what circumstances did you write on these Exhibits 83 to 130 the date '8/6/55' then 'To be filled' and [fol. 156] on various dates?

"A. As I said before, that was the morning when I was in the store with Mrs. Waxman, and these were brought in.

"Q. By whom?

"A. By the Doctor.

"Q. Dr. Needelman?

"A. Dr. Needelman.

"Q. All right.

"A. We—I was told—I should say I was told by writing it that way on the dates that they were to receive them, and not more than one a day, if they wanted it, they were to—by writing 'To be filled' with that date would make it a prescription.

"Q. What conversation took place between you and Dr. Needelman about writing those on those prescriptions?

"A. You mean at that time?

"Q. Yes, sir.

"A. Well, as I recall—I don't recall. He had been writing and being tired, it would be sufficient, even in my writing, to write it in as long as the date was written when they were filled.

"Q. Did you say to Dr. Needelman, 'You write it in,' or words to that effect?

"A. I don't recall.

"Q. As a matter of fact, didn't you say to Dr. Needel- [fol. 157] man, 'You write it in,' and he said, 'I am too tired; my arm is about to fall off,' or 'I am too busy,' or words to that effect?

"A. Words to that effect.

"Q. You then proceeded to write the date in there and 'To be filled'?

"A. That is right.

"Q. What, if anything, did Dr. Needelman tell you would happen if on a prescription that had to be filled in, say, 9/20/55, if they didn't come in on that date for that prescription, then what did he instruct you to do with that particular prescription?

"A. As I recall, they were to be put aside. I believe he picked those up when he came back.

"Q. The Doctor told you not to give it to the patient; is that correct?

"A. Yes, sir.

"Q. Do you know of your own knowledge whether or not Mrs. Bruches came into the store and got a prescription from you and took it to another pharmacist to be filled during this time?

"A. Yes. That happened two or three times in between deliveries of these items, when we didn't have it in the store.

"Q. As a pharmacist, how long had you known Abe Bruches and Lottie Bruches as patients who were having [fol. 158] prescriptions for Codeine filled?

"A. The entire period I was in the store.

"Q. How frequently would they come in with these prescriptions?

"A. On an average of once a day.

"Q. Had they been coming in with these prescriptions for that medication from doctors other than Dr. Needelman?

"A. I don't recall that.

"Q. But you do recall them coming in as patients with that prescription and for that medication?

"A. Yes, sir.

"Q. What conversations, if any, took place between you and Dr. Needelman as to whether the Bruches would or would not pay something on account of a bill that they, the Bruches, owed to the Doctor?

"A. I can't say if it was from the Doctor or in the discussion there at the time.

"Q. Tell us what it was.

"A. That they had owed the Doctor some money, and if they would leave any moneys to put it aside for him.

"Q. Did the Bruches at any time leave with you money for that purpose?

"A. Yes.

"Q. Was there a specific amount that they would leave with you?

[fol. 159] "A. No.

"Q. Did they leave money with you on each occasion they were in?

"A. No.

"Q. Do you recall of any instance when the Bruches were in and did not even pay for the prescriptions?

"A. There were several times like that.

"Q. During that period of time, that is, in August and September of 1955, can you give me a fair estimate of the average number of prescriptions that would come through the drugstore?

"A. Oh, it would be over a hundred.

"Q. Did you knowingly, or are you conscious of having done anything wrong in filling these prescriptions that you have identified?

"A. No, sir.

"Q. Did Walter Waxman ask you to do anything wrong, irregular or unlawful in the filling of that prescription?

"A. No, sir.

"Q. Has he ever at any time asked you to do anything wrong or unlawful as to any prescription?

"A. No, sir.

"Q. Did you enter into any combination, conspiracy, or agreement with Walter Waxman to furnish any person narcotic drugs contrary to the provisions of the law?

[fol. 160] "A. No, sir.

"Q. Did you have any such agreement with Bernice Sachs to furnish narcotic drugs unlawfully to any person?

"A. No, sir.

"Q. Did you have any such agreement with Sally Rossman?

"A. No, sir.

"Q. Did you have any such agreement with Lillian Fredericks?

"A. No, sir.

"Q. Did you have any such agreement with Harry Needelman?

"A. No, sir.

"Q. Did you have any conversation with any persons about these prescriptions other than the conversation that you have testified to with Dr. Needelman about the prescriptions for the Bruches?

"A. Well, in the normal course of running the store the subject would have come up with Mr. Waxman within the day or two that it happened.

"Q. What would come up? What do you remember specifically?

"A. Well, about him taking the prescription out, only to take the one that is dated for that day, if it is not used to put it aside, and they left any other money just to put it in the package there.

"Q. I am talking about any patient or customer of the store other than the Bruches.

"A. Oh, no; no, sir.

[fol. 161] "Q. What was said by Dr. Needelman in reference to if the Bruches would not leave any money to apply on their bill, what, if anything, did he say about whether the prescription should or should not be filled and delivered?

"A. There was no question on that at all. If they left anything we were to accept it, but it had nothing to do with his holding the prescription back from them.

"Q. You would honor the prescription?

"A. Yes, sir.

"Q. If they did leave any money to take it and hold it aside for him?

"A. Yes, sir."

"Redirect examination.

"By Mr. Rosen:

"Q. To the best of your recollection, have you ever written in the words, 'To be filled' and dated prescriptions or pieces of paper at any other time?

"A. You mean during the same period?

"Q. At any time.

"A. Yes, there was.

"Q. You wrote in the words 'To be filled'?

"A. Yes, sir.

"Q. For whom?

"A. I wouldn't recall now.

"Q. You dated prescriptions for physicians?

"A. Under their direction.

[fol. 162] "Q. Name one.

"A. Just Dr. Needelman.

"Q. No other doctor?

"A. You asked me just for him.

"Q. For any other doctor did you do that?

"A. Not to my best recollection now, no.

"Q. I am not sure that I understand exactly what procedure you followed when Dr. Needelman left this pad of Codeine papers. Do I understand that you sat down and filled in each one by dating all the way through this entire pad?

"A. I don't know if I finished the pad, but it would show if I had stopped or not.

"Q. I hand you Government's Exhibit No. 80, which you have identified as having been filled by you, and the words, 'To be filled 8/11/55,' and also, 8/6/55'. Will you tell me the name of the patient, the person to whom that paper is made out?

"A. Harvey Sachs.

"Q. What is the narcotic drug called for in that?

"A. Methadon.

"Q. Was that left with you or the store?

"A. No, these were not left with the store.

"Q. The Methadon was not left, but your handwriting appears on it, with the words, 'To be filled' and two dates?

"A. Yes.

[fol. 163] "Q. Now, when did you write that in, Mr. Kamisarow?

"A. I can't answer that one now. I mean, I wouldn't know how to answer that when you say 'now'.

"Q. Will you look at the document and see if you can tell me when you put in those dates.

"A. That would have been written on 8/11/55.

"Q. So, you put in the date '8/6/55' and the words, 'To be filled'?

"A. Right.

"Q. And then '8/11/55'?

"A. That is right.

"Q. I hand you Government's Exhibit No. 81 and ask you the name of the person to whom that is made.

"A. Renee Pollack.

"Q. What is the narcotic drug called for in that?

"A. Demerol.

"Q. Was that left at the store?

"A. I don't think this was.

"Q. You have already identified the words 'To be filled' and the dates.

"A. Yes, sir.

"Q. Will you tell me, please, when you wrote those dates in and those words.

"A. From what it shows here it would have been on the 6th, 8/6/55, to cover 8/11.

[fol. 164] "Q. Are there any others that you know of that were not left at the store that you filled in the dates and the words, 'To be filled'?

"A. No; I wouldn't remember that."

Mr. Rosen: That is all.

* * * * * * *

[fol. 187] K. C. Rudd was called as a witness on behalf of the Government, having first been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Cline:

Q. Will you state your name, please, sir?

A. K. C. Rudd.

Q. Where do you live?

A. Miami, Florida.

Q. By whom are you employed?

A. The United States Treasury Department, Bureau of Narcotics.

Q. Your occupation, Mr. Rudd?

A. Narcotic Agent.

Q. How long have you been a Federal Narcotic Agent?

A. Since 1935.

Q. That would be about twenty-two years. Is that correct?

A. Yes, sir.

[fol. 188] Q. How long have you been a Federal narcotic officer in the Miami area?

A. This past eight years.

Q. Do you know Dr. Needelman and Walter Waxman, the defendants in this case?

A. I do.

Q. Did you have occasion to contact them in connection with your official duties as federal narcotics officer during the months of July, August and September, 1955?

A. During September.

Q. What was the occasion for that, Mr. Rudd?

A. The occasion was that I was making an investigation and inspection of the narcotic activities of pharmacies—of Mr. Waxman's drugstore at Miami Beach, and the narcotic practices of Dr. Needelman in connection with his having a federal narcotic tax stamp as did Mr. Waxman. That was the purpose of my contacting them.

Q. Do you recall the approximate date, sir?

A. Yes. I talked to them in connection with this case the first time on September 22, 1955.

Q. Who was present, Mr. Rudd, as best you can recall?

A. As to which defendant?

Q. Let's start with Mr. Waxman. Who was present. The approximate date that you first talked to Mr. Waxman regarding this matter.

[fol. 189] A. On the 22nd there was present myself, Federal Narcotic Agent Waters, Florida State Narcotic Agent Bellinger and also Mr. Kamisarow, who has been mentioned here before.

Q. Where did this conversation take place?

A. That conversation was after I had talked to Dr. Needelman the same date but much later on that date.

Q. You talked to Dr. Needelman first?

A. Yes. Actually, I talked to Mr. Kamisarow first, in connection with this case on that date.

Q. As far as Dr. Needelman and Mr. Waxman is concerned, you spoke to Dr. Needelman before you spoke to Mr. Waxman?

A. Yes, on that date, the 22nd.

Q. On the same date?

A. Yes.

Q. Who was present when you talked to Dr. Needelman?

A. Federal Agent Waters and Florida State Narcotic Agent Bellinger.

Q. Where did that conversation take place?

A. In Dr. Needelman's office.

Q. Will you relate as best you can the gist of the conversation, what was said by Dr. Needelman, yourself and anyone else present.

A. Well, as I entered the office Dr. Needelman was out in the reception part of his suite of offices over on Miami Beach. At that time a person whom I found out later to be

[fol. 190] Dr. Szekely was there with him talking in the reception room, but Dr. Szekely was not present during any of the conversation there in regard to this case. The only one present at that time during that initial conversation was Dr. Needelman. On the 22nd was myself, Federal Agent, Waters and State Narcotic Agent Bellinger. In connection with my duties and my job I had had occasion previous to that time to talk to Dr. Needelman.

Q. Do you recall when that was?

A. Yes, in 1952.

Q. What was the nature of that conversation?

A. Well, the nature—

Mr. Roberts: I object to any conversations had back in the year 1952. It is not connected with this case. It is too remote.

The Court: Sustained.

The Witness: I had talked personally with Dr. Needelman for some time previous to the date of September 22nd, 1955, as I have stated, and it was in 1952. So when I went to his office accompanied by the other officers I introduced myself in the event he did not remember me. However, he did remember me. Nevertheless, being I was on official business to his office I did exhibit my credentials to him and introduced the other officers with me by their names and [fol. 191] ranks at that time, and I told Dr. Needelman that I was there in connection with his holding at that time a Federal narcotic tax stamp. In other words, he then was a registered physician as he still is now, I imagine. Every person, a druggist, hospital or doctor who deals in any way in narcotics—whether handling of them or prescribing or storing or so forth, they must be registered by the Federal Government and the Treasury Department, my department. And it is part of my duties to make inspections and whatever inquiry I find it necessary of anyone in my territory of South Florida having such a tax stamp from the Government so I explained to the Doctor that the purpose of my visit there was to make certain inquiries and inspection of his narcotic activities of recent dates. At that time I asked him if he had any objection to being thus inspected and questioned, and interviewed by myself in connection with his official tax stamp that he then held, and he said, "No" I told him that I was going to ask him some questions about

some prescriptions that he had written recently and asked him if there was any reason that he knew of that he did not want to answer my questions about those prescriptions or the people, and he said, "No". He was willing to answer. I then exhibited and laid out in front of him on his desk several prescriptions that I had on that date just shortly previous to the time I visited his office,—that I had removed and taken from the narcotic prescriptions files of the [fol. 192] Waxman drugstore, which is half a block away. I told him that it was in regard to the people named in those purported prescriptions that I wanted to talk to him about. At that point Dr. Needelman himself, without any further questions or prompting of mine started to tell me all about the people named in those prescriptions. He immediately started to tell me that, "Oh, yes, you mean those addicts." He said, "Those people who are old opium and heroin and morphine users." I said, "Yes." Frankly, I was a little amazed that the doctor would tell me that, describe those people as "addicts" as he did. Then I asked him if he had written these prescriptions. He said, "Yes". That before leaving for Europe on his vacation on or about August 6th that he had written out and had these prescriptions prepared and left with his office girl there in his office with instructions that when these people came in for treatment that they, the office girls, should give whoever came in one of these pieces of paper and collect the proper fee that he had been charging previously and keep it for him. The people that we were talking about and whose names are shown and were shown on the pieces of paper which I prefer to call purported prescriptions, are and were Fidele Garcia, Harvey Sachs, Alice Buononito, Renee Pollack, Gerald Miller, Abe Bruches and Lottie Bruches. The prescriptions in question, of which I am talking about here—

By Mr. Cline:

Q. Just a minute, Mr. Rudd. I have handed you a group [fol. 193] of purported prescriptions previously identified as Government's Exhibits 1 through 138 for identification and I ask you if you recognize and can identify these exhibits, each and every one of them.

A. Yes.

Q. When did you first see them and how did they come into your possession, if they did?

A. We have to take them one at a time. Do you want to know where I first saw them?

Q. I want to know if you can identify each and every one of them.

A. These prescriptions I found on the narcotic prescription file of the defendant Waxman's drugstore, the Medical Arts Pharmacy at Miami Beach.

Q. Did you pick them up from the Medical Arts Pharmacy?

A. I did.

Q. And have they been in your custody and control since that time up to the time this case was originally tried up until—

A. Up until the case was originally tried and they passed into the hands of the Court.

Mr. Chappell: If your Honor please, at this time I am going to request that the jury be excused, because I want to question this man right at this particular point.

[fol. 194] The Court: All right, the jury will be excused.

(Thereupon the jury retired from the courtroom at which time the following proceedings were had.)

By Mr. Chappell:

Q. Mr. Rudd, you said that you picked up these prescriptions at Mr. Waxman's drugstore?

A. Yes, sir.

Q. Do you know who owned that drugstore?

A. At this time, no, I do not.

Q. At that time.

A. At that time, Mr. Waxman.

Q. It was not a corporation?

A. I cannot recall whether it was or not, sir.

Q. Now, is September 22nd the correct date that you claim you picked up these prescriptions in his drugstore?

A. Yes, sir.

Q. Who was present when you went to the drugstore?

A. In the prescription part?

Q. Yes.

A. Mr. Kamisarow and Mrs. Waxman, I believe.

Q. Mrs. Waxman?

A. I think she was there present at that moment.

Q. Did you have a search warrant?

A. I did not.

[fol. 195] Q. Did you have any legal paper at all?

A. Other than my credentials, no, sir.

Q. As a government agent?

A. Yes, sir.

Q. Do you know where Mr. Waxman was when you went in there?

A. When I was in there?

Q. Yes.

A. I was told that he was at school.

Q. At his home?

A. At school. I was given to understand he was taking a course at the university in the daytime, or something.

Q. Mr. Kamisarow was a licensed pharmacist in charge at that time?

A. I do not know whether he was licensed under the laws of the State of Florida or not. That is none of my business or concern.

Q. He is the man you talked to?

A. He was in charge. I contacted him.

Q. And he was the one that got out the narcotic prescription file for you to look at?

A. Yes, sir. I told him I wanted an examination of the narcotic prescription file, the cancelled prescriptions the ones that had been filled.

Q. And after you had examined them is it true that you took out of the file these prescriptions that you have there in front of you?

[fol. 196] A. Yes, sir.

Q. You gave Mr. Kamisarow a receipt for them?

A. I gave the store a receipt, let's say. Mr. Kamisarow—I handed him the receipt and left it in the file.

Q. You carried the prescriptions with you out of the store?

A. I did.

Q. And you have had them ever since?

A. No, I have not had them ever since. I have had them except the time they have been in the custody of the Clerk of the Court.

Q. When they had the previous trial?

A. Yes, sir.

Q. Had Mr. Waxman come into the store before you left with these papers?

A. No. When I went back later that afternoon he was then there.

Q. But you had already taken the prescriptions with you at the time and given them a receipt, had you not?

A. Yes, sir. Pardon me. I cannot recall whether I gave a receipt during the first or second visit into the store that afternoon.

Q. What is that?

A. I said I cannot recall whether I gave the receipt during the first or second visit into the drugstore that afternoon.

[fol. 197] Q. You took the papers when you were there on your first visit, these prescriptions, did you not?

A. I took these prescriptions, yes, sir.

Q. And you mean you came back later on that day?

A. Yes, sir. After talking with Dr. Needelman I went back and talked to Mr. Waxman when he came to the store.

Q. When you talked to Mr. Waxman you had already had the prescriptions and had taken them out of his drugstore, had you not?

A. Yes, sir.

Q. Did he give you any consent to take them out of his drugstore?

A. No, sir. He wasn't there. Besides, I didn't need any consent.

Mr. Chappell: I think that is a question of law and a conclusion of the witness and I move to strike that part of the answer.

The Court: That will be denied. We are now trying something in the way of a suppression. He didn't need any, he says.

Mr. Chappell: That's all.

The Court: Did you talk to Mr. Waxman that afternoon?

The Witness: Yes, sir.

[fol. 198] The Court: Did you tell him you took the prescriptions?

The Witness: Yes, sir. And I told him I was taking them and asked him if he had any objection and he said, "No." I know Mr. Waxman, your Honor, quite well, and had taken prescriptions from his store on other occasions previous to this case. Actually, if I may say so to the Court, these prescriptions are being filled by a pharmacist, and once they are filled they have a number, and from that moment on those prescriptions belong to the Bureau of Narcotics, Treasury Department. The store is merely custodian of them for the Government.

Mr. Chappell: That is not the law as laid down.

The Witness: The law says they are required to be kept—

Mr. Chappell: For two years, for inspection.

The Witness: They are not re-fillable from that moment. From that moment they are not good to anyone.

The Court: What do we have before us?

[fol. 199] Mr. Chappell: I was going to put another witness on. I was going to put Mr. Waxman on.

The Court: All right. Come down.

Thereupon: WALTER WAXMAN was called as a witness in his own behalf, and having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Chappell:

Q. Mr. Waxman, were you present in your store—you own the Medical Arts Pharmacy, do you not?

A. Yes, sir.

Q. Is that incorporated?

A. No, sir.

Q. You own it?

A. Outright, sir.

Q. Were you in your drugstore on September 22nd when Mr. Rudd took the prescriptions out of your narcotic file and carried them out of your door?

A. No, sir.

Q. Did you give him your consent to take those prescriptions out of your drugstore?

A. No, sir.

Q. Did you have any knowledge that he had taken them out?

A. No, sir.

[fol. 200] Q. When did you first gain knowledge that he had taken them out?

A. When Mr. Rudd came back and told us that he picked all the prescriptions up.

Q. You don't know how long after that or when he was there?

A. I was there in the afternoon and Mr. Rudd picked them up in the morning, as I understand.

Q. What do you mean by afternoon?

A. Five or six o'clock in the evening.

Q. In other words, he had the prescriptions before you knew anything about it?

A. Yes, sir.

Q. And you had not given him, nor any other Government agent, or State agent, the right to take those prescriptions out of your store?

A. No, sir.

Q. Were they your property?

A. Yes, sir.

Mr. Chappell: That's all, your Honor.

The Court: You heard Mr. Rudd state that he told you he had taken them out and you said, "That's all right."

[fol. 201] The Witness: That is not true. Mr. Rudd never told me that he took them out.

The Court: He said you said it was all right for him to take the prescriptions out; is that true or not?

The Witness: No, sir.

The Court: That is not true?

The Witness: No, sir.

By Mr. Chappell:

Q. Do you know what time in the morning he took them out of the store?

A. I wasn't there.

Q. You don't know? You know it was around five or six o'clock when you got there that evening?

A. Yes, sir.

Q. And they were gone?

A. Yes, sir.

Q. And you say that when you saw Mr. Rudd that evening you did not tell him it was all right for him to take the prescriptions?

A. I didn't get that.

Q. You did not tell him it was all right for him to take the prescriptions?

[fol. 202] A. No, I did not.

Mr. Chappell: That's all.

(Argument off the record.)

DENIAL OF MOTION TO SUPPRESS

The Court: I will deny your motion to suppress.

(Thereupon Court was adjourned until 1:30 P.M. of the same day, at which time the following proceedings were had, in the presence of the jury.)

Mr. Cline: Your Honor, at this time I am going to offer Exhibits 1 through 138 in evidence.

The Court: I will admit them subject to the objections of Mr. Chappell.

Mr. Chappell: Yes, sir. In order to shorten the thing, I will object to them upon the ground as laid out in my motion to suppress.

The Court: I noted a continuing objection, anyway, when you made your first objection, and also for Mr. Roberts, and I think it is in the record. If not, it is now.

(Thereupon, the jury returned to the Courtroom, and the following proceedings were had.)

[fol. 203] K. C. Rudd resuming the witness stand, testified further as follows:

By Mr. Cline:

Q. Mr. Rudd, at this time I hand you Government's Exhibit 139 for identification and ask you if you can identify those documents?

A. Yes.

Q. Where did you first see them, Mr. Rudd?

A. In Dr. Needelman's office on September 22, 1955 on the occasion of the visit and conversation which I was testifying to before Court was adjourned.

Q. How did these come into your possession, if they did?

A. In the course of conversation these pieces of paper came up in the conversation. Dr. Needelman took them out of his desk drawer and handed them to me.

Q. And they have been in your possession continuously until they came into court here. Is that correct?

A. That's right.

Mr. Roberts: We object to the introduction into evidence on the ground that the prescriptions have never been filled.

The Witness: They are the ones with the date in blank.

[fol. 204] Mr. Cline: That is correct, your Honor. They were given to Mr. Rudd by the doctor.

The Court: I sustain the objection.

Mr. Cline: These are not being introduced as prescriptions. They are being introduced merely on the basis of documentary evidence furnished by Dr. Needelman voluntarily.

The Court: All right. I am holding that it is immaterial. That is the reason I am refusing them.

By Mr. Cline:

Q. Mr. Rudd, I hand you Government's Exhibit 141 for identification and ask you if you can identify that document?

A. I can.

Q. When did you first see it?

A. In Dr. Needelman's office on the afternoon of the 22nd September, 1955.

Q. What conversation, if any, took place at that time regarding this document?

A. This was one of a number of documents that the Doctor handed to me which was the remaining one of this name which he had furnished to the defendant Waxman's drugstore prior to leaving for Europe.

[fol. 205] Q. Did you have any conversation with Dr. Needelman about how this had come back into his possession?

A. Yes, sir.

Q. What was the nature of that conversation?

A. Well, we were talking about the Bruches, that is Abe and Lottie Bruches. Dr. Needelman told me that on that very date of September 22nd before I had arrived at his office, that he had gone to the drugstore after having just arrived back from Europe on that day or just the day before, something like that—he had visited the drugstore upon arriving back from Europe and on the very day had received that document and other back from the drugstore which had not been used by the drugstore during his absence, and that he had—

Q. Was there any conversation about anything else he may or may not have picked up from the drugstore?

A. Yes. With that document and some others he had picked up $175.00 cash from the drugstore.

Q. Was there any conversation between yourself and Dr. Needelman as to what that $175.00 was for or represented?

A. Yes; that that represented fee payment to him, Dr. Needelman, collected from Abe and Lottie Bruches at the rate of $2.50 each for the purported prescriptions left at the drugstore on or about August 6th, and that fee of $175.00 was for the prescriptions used and sold by the drugstore to the Bruches during his absence.

[fol. 206] Q. Mr. Rudd, Government's Exhibits in evidence, 64 through 138, I believe are the ones that were sold to Abe and Lottie Bruches; is that correct?

A. I would have to examine them to tell you.

The Court: They speak for themselves.

By Mr. Cline:

Q. Mr. Rudd, did you make a calculation of the prescriptions that you received from the drugstore that had been filled for Abe and Lottie Bruches?

A. Yes, sir.

Q. What was the result of that calculation?

A. At $2.00 each, it came out even, less $2.50, or over. It was one way or the other. $2.50 over or under of the total amount of purported prescriptions sold to the Bruches. In other words, that $2.50—it came out almost on the nose. There was $2.50 difference.

The Court: What came out on the nose?

The Witness: The amount of the prescriptions—purported prescriptions sold by the drugstore to the Bruches by the drugstore at the rate of $2.50 each for each prescription.

The Court: What does it aggregate?

[fol. 207] The Witness: $2.50. There were sixty-eight prescriptions and I think they would run $172.50.

By Mr. Cline:

Q. Mr. Rudd, I have handed you Government's Exhibits 142 for identification. Will you identify those documents?

A. I have put my initials thereon.

Q. When and where did you first see them?

A. On September 22nd, 1955 at Miami Beach in the office of Dr. Needelman.

Q. Did they come into your possession?

A. They did.

Q. How did they get into your possession?

A. Dr. Needelman gave them to me.

Q. Did you have any conversation with Dr. Needelman about what they were?

A. Yes, sir.

Q. Did Dr. Needelman identify those documents for you, Mr. Rudd?

A. Yes, he identified them and explained what they were.

Q. What did he say they were?

A. He said those were the remainder of the prescriptions that he had written and prepared but not dated, and

left at his office upon departing for Europe on or about August 6th. The remainder of those which he had left with his office girls when he left and gave them instructions how [fol. 208] to dispense them to the persons named on these pieces of paper.

Q. Have you compared the names that appear on these with the names appearing on Government's Exhibits 1 through 64?

A. Yes, sir.

Q. Are they the same or different names?

A. They are the same.

Mr. Cline: At this time I offer in evidence Government's Exhibits 141 and 142 for identification.

Mr. Roberts: To which we object on the same grounds heretofore advanced on which we have been sustained, that it is incompetent, irrelevant and immaterial and has no bearing on the case. None of these prescriptions were ever filled.

The Court: Sustained.

By Mr. Cline:

Q. What further conversation did you have with Dr. Needelman on that same date?

A. In my conversation about these same people, Garcia, Buononjto, Miller, Sachs, Pollack and the Bruches, I asked him if any of these people had ever been cured of their addictment to narcotic drugs and he said they had. I asked him how many had been cured and he said he didn't know. I asked him if any of them had ever been cured at the United States Public Health Hospital at Lexington, Ken- [fol. 209] tucky. He said one or two had, but that he wasn't sure whether one or two had been cured.

I asked him if he had ever discussed with these people about the advisability of them taking the cure, for instance, going to Lexington Hospital for a supervised cure. He said he had talked to them about it, but that they would not go because they were working, or they could not go because they were working, but that he had talked to them about their jobs more than about the cure; and I asked him about that and he said that he thought it was wonderful, because

these people by using Methadon could go out on their job and keep working and not have to go out on the streets to buy heroin, morphine or a derivative. I asked him if he felt that the Methadon that he was furnishing either directly or indirectly to these addicts was shortening their addiction to narcotics, and he said he did. I asked him if he knew that Methadon was a narcotic drug and he said it was. I asked him to what degree. He said it was less habit forming that morphine. I asked him that if in his daily practice other patients besides these addicts coming in to his office complaining of pain did he ever find it necessary to prescribe or give narcotics to any of these other normal people coming to his office, and he said that he did. I asked him how much narcotics he ever gave to any of his normal patients for any pain and he said, "One shot." I asked him if he considered ten milligrams of Methadon, one [fol. 210] tablet, to be one shot and he agreed. He said, "That is one shot". That is when I asked him, "Well, then, why did you find it necessary to give twenty-four tablets, twenty-four shots, to these people on one prescription?" And that's when he said, "Because they told me they needed it." I asked him then if he considered that if any of these addicts, with the possible exception of the Bruches, were withdrawn from narcotics properly they would suffer any pain or, rather, any ill effects other than normal withdrawal symptoms. And he said, no, that he didn't think so. I asked him if it were possible and I asked him, supposing if in his medical opinion that these people with the possible exception of the Bruches, could be cured, and he said, yes, he thought they could be cured.

By Mr. Cline:

Q. Did you ever have any conversation with the Doctor concerning the fees charges to the patients that came to the office and the Bruches?

A. Yes.

Q. What was the nature of that conversation?

A. I asked him what his instructions were to the girls in the office as to the amount of fees to be charged for each one of these pieces of paper and he said, "Ten dollars for some, five dollars for others, or two dollars and fifty

cents for others." In other words, it was ten dollars for Miller, ten dollars for Buononito, for each one. Five dollars [fol. 211] to Harvey Sachs and two-fifty each to the Bruches.

Q. Did you have any conversation as to why he left the prescriptions for the Bruches at the drugstore rather than have the people pick them up at the office, from the office girl?

A. Yes. He told me that the Bruches had been coming to him for some time. He said that Abe Bruches had been coming to him longer than Lottie Bruches, Abe's wife, but Abe was a barber working steadily at the job of barbering at a place there in Miami Beach and that the reason that he left the Bruches' prescriptions with the drugstore on leaving for Europe was because his office many times were closed by the time Abe Bruches got through with his barbering job, and, therefore, he left them with the drugstore so they would be accessible to him, even though his office was closed.

Q. I show you Defendant's Exhibit 1 for identification and ask you if you have ever seen that before?

A. Well, I have no way of knowing if this is the book that Dr. Needelman showed me.

Q. Did you see a book similar to that at Dr. Needelman's office?

A. Yes, sir.

Q. Did you have any discussion with Dr. Needelman about that book and the entries contained therein?

A. Yes, sir.

[fol. 212] Q. What was the extent of that conversation?

A. I wanted to check with the Doctor. I wanted to check the number of the prescriptions that had been cashed in this case, this appeared as against the Doctor's day book or any office record that he wanted to show me; and he did readily show me the day book. I presume this is the same one. I have no way of knowing, and I checked it quite extensively against the number of prescriptions, against the entries in the book, and it was substantially correct. In other words, there appeared to be the proper number of entries in the book with the prescriptions that had been filled. While examining the book I noted that there were

some entries during the period in question with a twenty dollar notation. One I specifically recall is a notation as to Fidele Garcia, and I asked the doctor what about that twenty dollar item, and he explained to me that there were times some of these people—and as he specifically recalled, Fidele Garcia was not able to come to the office the following day after being there, and that he was given a piece of paper, a prescription, without his coming, and that, therefore, twenty dollars was charged because it was two pieces of paper—two prescriptions. And I asked him if he considered that a treatment by him even in his absence, and he said he did. That was all.

Q. Did you have any conversation as to why some of these persons received Methadon, some Demerol and some Codeine?

[fol. 213] A. I didn't get it.

Q. Did you have any conversation with Dr. Needelman concerning the fact that some of these prescriptions were for Demerol, some Methadon, and some for Codeine?

A. Yes. It was rather routine like Codeine for the Bruches, Methadon for the other people, and Demerol for, I believe it was Renee Pollack, because it was a drug that they had been using for some time.

Q. Now, Mr. Rudd, in connection with your official duties as a Federal Narcotics Agent did the names Fidele Garcia, the Bruches, Gerald Miller, and the other ones mentioned on these so-called various prescriptions—are you familiar with those names in connection with your official duties?

A. I am familiar with all except the name Renee Pallon. The others I had been familiar with.

Q. The date of this conversation that you are talking about with Dr. Needelman was the 22nd of September, is that correct, 1955?

A. Yes, sir.

Q. What subsequent conversation did you have with Dr. Needelman and Mr. Waxman or their employees after that date?

A. Well, on that date—you mean after that date?

The Court: After the 22nd.

By Mr. Cline:

Q. Did you have a further conversation on the 22nd?
[fol. 214] A. Yes.
Q. Where?
A. Over in the drugstore.
Q. With whom?
A. With Mr. Waxman and Mr. Kamisarow.
Q. Who was present, if anyone, who else was present, if anyone?
A. Mrs. Waxman was present.
Q. Anyone else? Any other narcotic officer?
A. One of the other physicians, Dr. Szekely, may have been present. I am not sure what times. I cannot recall the date.
Q. What was the purpose of that conversation and what took place?
A. On the first visit to the drugstore, that was about noon of the 22nd. That was when I observed these prescriptions on the narcotic file. That was the first time I had ever seen them. That is when I took them. Then I too took the prescriptions that I have stated here and took them to Dr. Needelman's office and then had this conversation with Dr. Needelman, showing him these prescriptions. It came up during that conversation, as I have stated, that there was some unused prescriptions. After I got through talking with Dr. Needelman I immediately went back to the drugstore to check to see if that were all. Mr. Waxman was [fol. 215] there then. He had not been there earlier in that afternoon. I asked him if there were any more prescriptions for the Bruches or anyone else that had been left there by Dr. Needelman. He looked in his safe and said, "No, there is none here." Then he turned to Mr. Kamisarow who was present and asked him, "Where are the Bruches' prescriptions," and Mr. Kamisarow responded, "All gone. The Doctor picked them up. They are all gone." I then had a further conversation with Mr. Waxman, who I know and who has known me for some time. He knew who I was, and he wanted to ask me, and in fact, did ask me at that time if he was in trouble, and I told him that I didn't know yet, that I was just making an inspection and inquiry.

And he asked me if I was going to arrest him at that time and I told him I didn't know. "I am not through yet." And he asked me when I was going back to the store." I said I would be back to the store tomorrow to make an inventory of his stock which would take, as he would know, and I knew it would take at least half a day. That is about all the conversation that I had with Mr. Waxman at that time. I did have some conversation with Mr. Kamisarow.

Q. Was Mr. Waxman present at the time of that conversation with Mr. Kamisarow?

A. No.

Mr. Chappell: I would object to it.

The Court: Sustained.

[fol. 216] Mr. Cline: Mr. Kamisarow was charged as a co-conspirator.

The Court: He was not arrested as a co-conspirator.

By Mr. Cline:

Q. Skipping the conversation with Mr. Kamisarow, what took place next?

A. Well, nothing more occurred on that day. The next day I went back to Dr. Needelman's office and had some conversation with him and at that time had a conversation with one of his office girls named Sally Rossman. Neither Sally Rossman nor Lillian Fredericks were present at Dr. Needelman's office on the 22nd, so I had a two-fold purpose in going back to the office on the 23rd. I was accompanied at that time by Narcotic Agent Walters. Shall I proceed with the conversation?

By Mr. Cline:

Q. If Mr. Waxman or Dr. Needelman were present.

A. I had a conversation with Dr. Needelman and a conversation with Sally Rossman.

The Court: When you talked to Sally was Dr. Needelman there?

The Witness: Yes, sir.

By Mr. Roberts:

Q. Was he present and heard the conversation?

[fol. 217] A. Yes, it was in his inner office.

The Court: They called Sally in there and the three of you were there?

The Witness: Four of us, two agents, Dr. Needelman and Sally Rossman.

By Mr. Cline:

Q. Continue with the gist of that conversation as best you can recall.

A. At that time, since having picked up these prescriptions and observing the names on the prescriptions in the interim between the afternoon of the 22nd and the time I talked to Dr. Needelman on the 23rd, that was in the afternoon also, I secured from my files and other files over in Miami Beach photographs then available of a number of these people we are talking about, Fidele Garcia, Gerald Miller, Harvey Sachs, Alice Buononito and Abe and Lottie Bruches. I laid the photographs down on Dr. Needelman's desk in front of him and asked him if these were the same people we had been talking about, and had talked about, whose names appeared on the prescriptions.

Q. Are these the photographs you have just referred to?

A. These are the very photographs.

Q. You exhibited these to Dr. Needelman?

A. I did.

Q. What was his response?

[fol. 218] A. His response was immediate. "Those are the people". Then I had a conversation with Sally Rossman in Dr. Needelman's inner office there and asked her if she had written any of the notations on any of the prescriptions, and she said that she had. That she had written the words, "To be filled," and all of the dates, as best she could recall—practically all of the August 6, 1955 dates she said she wrote. There were two or three, if my memory is right, that she couldn't quite say whether she wrote them or not. The main portion she was positive she had written in the date and those words, and I asked her on whose instructions

it was, and she told me it was Dr. Needelman who told her to do it, and that she had done it at the time of him departing for his vacation, and I asked her where she kept the prescriptions. She said that she and Miss Fredericks kept the prescriptions locked up in their desk in the reception room of the office. Then I exhibited the photographs to her and she was likewise able to identify them with the exception of the Bruches, if my memory is right. She was not too sure about the Bruches' photographs. But the other persons that I showed her in the photographs, Fidele Garcia, Gerald Miller, Alice Buononito and Harvey Sachs, she recognized them from the photographs. I asked her what she did with the money that she collected for the pieces of paper. She said that she put the money right there in the desk drawer with the unused prescriptions, and I [fol. 219] asked her what she did with the money. She said that although she did not deposit it, it was for deposit in Dr. Needelman's account, although she herself said she never carried the money to the bank. I asked her if she was a registered nurse and she said, "No." I asked her if she was acquainted with any other activities of these people such as Fidele Garcia and Gerald Miller other than when they came there to the office. That's all she knew about them, and that was about the extent of the conversation with Sally Rossman and Dr. Needelman on that date.

Q. Did you have any conversation at any time during the course of this investigation with Mr. Waxman regarding his instructions from Dr. Needelman, if any?

A. Yes.

Q. What was the extent of that?

A. That was on September 28th. That was on the occasion on the same date that I made the physical count of the inventory of his drugstore. At that time certain of the prescriptions which were his—that is, the initial "W" on them, I asked him if he had filled these prescriptions and he said, "Yes". I asked him why he had filled these prescriptions or even allowed them to be filled at his store. His answer was, "I must have been stupid". He said then that Dr. Needelman, upon leaving for Europe, had brought all of the prescriptions, the one for Fidele Garcia, Gerald [fol. 220] Miller and all of them, including the Bruches, to

his store and suggested to him, Mr. Waxman, that he fill them out; that he examined the prescriptions and rejected those of them other than the Bruches. That he would not hold and keep those at his store, but that he did agree to keep the Bruches and that he did keep them. I then asked him why he did that specifically, and he said that when Dr. Needelman came to the store on getting ready to go to Europe and wanted him to take all these prescriptions and handle them, and that Dr. Needelman told him that "These addicts are patients of mine and it is all right, and they are registered with the Narcotic Bureau". That is what Dr. Needelman told him. And I said, "You, as a fact, know, I believe, there is not thing as a registered addict in my bureau". And he said, "Yes, I know that, but the Doctor said that it was all right, so I took them", and he repeated this conversation, those words, to me. In fact, he repeated it about five times during that conversation, "I must have been stupid."

Mr. Cline: Thank you, Mr. Rudd. Your witness.

Cross examination.

By Mr. Roberts:

Q. What is your investigation—your first investigation in this matter was on what date?

A. My first investigation that initiated this matter was on September 21st.

[fol. 221] Q. The first conversation you had with Dr. Needelman or Mr. Waxman or Mr. Kamisarow was when?

A. In regard to this case?

Q. Yes.

A. 22nd of September, sir, 1955.

Q. That was in the morning; is that right?

A. No.

Q. Tell me when it was.

A. The first conversation that I had with Mr. Kamisarow was at the store and that was about noon, sir. The first conversation with the defendant, Dr. Needelman, was in the afternoon in the vicinity of two or two-thirty P.M. Right around in there.

Q. And then after talking to Dr. Needelman, about two or two-thirty, you went away—you went where?

A. To the drugstore, sir.

Q. Was Mr. Waxman there at that time?

A. Yes, sir.

Q. And is that when you had this conversation you just related, or did you go back another time?

A. No. On the 22nd my conversation—the lengthy conversation I had with him was on the 28th.

Q. Dr. Needelman, I think you said, had told you that he had gone on vacation?

A. Yes, sir.

[fol. 222] Q. And he had prepared these prescriptions and left them there in his office?

A. In the office and at the drugstore.

Q. The Bruches at the drugstore and the remainder of them in his office.

A. Yes, sir.

Q. By the way, on one occasion today I have heard you mention the name of Dr. Szekely.

A. Yes, sir.

Q. Who was he?

A. Dr. Szekely—I saw a man who I first saw in Dr. Needelman's office on the occasion of my first visit to him. He was talking to Dr. Needelman in the foyer, the reception room, but he left immediately and I did not talk to him until quite a few days later. Dr. Szekely—so he told me sometime later on—had been hired by Dr. Needelman to watch over the office there, but Dr. Szekely was not a doctor in the State of Florida—

Q. At what time was he not a doctor?

A. Not a Florida doctor—at the time the Doctor went to Europe.

Q. Do you know if the doctor had a licensed Florida physician in his office at the time he left to go on his vacation?

A. No, I don't know. Dr. Szekely told me that he got his [fol. 223] Florida license to practice after the Doctor left.

Q. You made a very thorough investigation of this matter, no doubt, Mr. Rudd?

A. In what phase, sir? Which phase are you talking about?

Q. As to anything connected with these prescriptions. You tried to get all the information you could, did you not?

A. Well, that's quite a question. I tried to get all the information you could, yes. I got all the information I was looking for, if that's what you mean.

Q. Well, now, did you investigate or ask any questions as to who was in charge of Dr. Needelman's office during his absence?

A. Oh, yes.

Q. Who did you find out or ascertain who was in charge of his office as a physician?

A. I asked Dr. Szekely if he was in charge, and he said, "No."

Q. He took a run-out powder?

A. Oh, no. He couldn't be in charge. He wasn't even a doctor.

Q. In all this investigation you had did anybody mention the name of Dr. Grier as being there in charge until Dr. Szekely got his license?

[fol. 224] A. No. Somebody did mention that a Doctor Grier was there for a couple of weeks, but that he left in a couple of weeks.

Q. Did you talk to Dr. Grier in any manner, way or shape or form, in connection with this investigation?

A. No, sir.

Q. You didn't go to see Dr. Grier to find out if the two weeks he was in charge of the office there he knew about these prescriptions?

A. It was unnecessary.

Q. I asked you, sir, did you?

A. No, sir.

Q. That's fine. Now, did you ask Dr. Szekely when he received his Florida medical certificate to allow him to practice medicine?

A. Yes.

Q. Did you ascertain what date Dr. Szekely was admitted to practice?

A. I recollect to the best of my knowledge he told me.

Q. What date did he tell you?

A. If my memory is right, August 18, 1955.

Q. Dr. Needelman left on August 6th. Is that correct?

A. Yes, sir.

Q. So it would make it approximately two weeks after Dr. Needelman left that Dr. Szekely got his license?

A. Yes, sir.

[fol. 225] Q. And I think your investigation showed that Dr. Grier was there for about the first two weeks after Dr. Needelman left.

A. I made no investigation to ascertain if any Doctor Grier, if there is such a person, was ever there.

Q. Didn't I understand you to say that you knew that a Doctor Grier was there for a couple of weeks right after Dr. Needelman left?

A. No, sir. I said I was told there was a Doctor Grier there, but did not say I knew there was a Doctor Grier there.

Q. Now, who told you that?

A. Dr. Needelman told me; the two girls in the office told me, and Dr. Szekely said there was or there had been.

Q. Then, I presume that all four of them having told you, that you presumed it was unnecessary to verify it?

A. I had no interest in the world in Dr. Grier. It was not necessary for me to verify Dr. Grier.

Q. Weren't some of the transactions involved in this case issued out of Dr. Needelman's office during the two weeks Dr. Grier was there?

A. If Dr. Grier was there there were some prescriptions issued—emanating from that office by the girls during the period August 6th to September 22nd.

Q. And you didn't feel it was necessary to go to Dr. Grier in your investigation to see what he knew about the [fol. 226] issuance of those prescriptions?

A. I found out all I had to know, sir.

Q. Do you know or didn't you know that Dr. Szekely himself issued some of these prescriptions?

A. These prescriptions?

Q. Yes, sir.

A. He may have sold some.

Q. Did you talk to Dr. Szekely at any length about this matter?

A. Yes.

Q. Now, there is a conspiracy charge here involving Dr. Needelman and Mr. Waxman to the effect that Dr. Needelman wanted the patients to go and get their prescriptions filled at Mr. Waxman's drugstore. Were all of these prescriptions that you checked, were they all filled in Mr. Waxman's pharmacy?

A: All the prescriptions which are in this case I found in Mr. Waxman's file right there. There is one in my file which has not been introduced—

Q. I didn't ask you that. Now, Mr. Rudd, you want to be fair in this case?

A. Yes, sir.

Q. Now, that morphine prescription was not written by Dr. Needelman, was it?

A. No. You said "in this case," sir.

[fol. 227] Q. Why are you injecting that doctor's morphine prescription and leading this jury to believe that Dr. Needelman issued it for morphine if it wasn't Dr. Needelman's prescription?

Mr. Cline: Objection. Cross examination is one thing and argument is another, your Honor.

The Court: Overruled.

Mr. Roberts: Read the question, please?

(Thereupon the question was read by the reporter as above recorded.)

The Witness: My understanding is that you want to know if all the prescriptions seized from these defendants in this conspiracy case were written by Dr. Needelman or seized from the defendant Waxman's store. There is one prescription which I picked up which was for one of the persons named which has not been introduced here. It is in my file. If that answers your question inclusively, that is the best I can answer it.

Q. Let's clarify this for the jury. You mentioned that you picked up a morphine prescription for one of these patients of Dr. Needelman's office?

A. Yes, sir.

[fol. 228] Q. One of these seven people we are talking about?

A. That's right, sir.

Q. Now, that was not a prescription that was written or emanated from Dr. Needelman's office, was it, sir?

A. No, but it was cashed by the defendant Waxman at his store.

Q. You don't have a single morphine prescription for Dr. Needelman, do you, sir?

A. Written by Dr. Needelman?

Q. That is involved in this case.

A. No, sir. Not in this case.

Q. Do you know of any instance where Dr. Needelman ever issued a prescription for morphine for any of these six or seven patients involved?

A. No, sir, not at all.

Q. By the way, morphine is a much more potent narcotic than Methadon or Codeine or Demerol is, is it not?

A. If you want to qualify me as an expert before I answer that—

Q. After twenty-two years don't you consider yourself an expert in narcotics?

A. Chemically; I am not a chemist. But to answer your question I will tell you that 1 cc of Methadon by the United States Department of Health Hospital is equal to 1 milligram of morphine and is equal to 1 milligram of heroin.

[fol. 229] Q. Injectable?

A. One milligram, that is all that is quoted.

Q. While we are on that, there is quite a bit of difference in the potency of oral narcotics and injectable narcotics. Is that not so?

A. I am not an expert on the treatment of addictions, sir, but I would say that—I don't think I ought to answer that—the degree of potency.

Q. All right. I won't embarrass you, Mr. Rudd. Let's get back to the trend of thought we are on, getting back to the conspiracy charge.

A. Yes, sir.

Q. You checked the prescriptions, I think you testified that were issued from Dr. Needelman's office during the period from August 6th to September 22nd of approxi-

mately there, of 1955, by looking at his cash book or day book. I think you testified to that.

A. Yes, sir.

Q. Now, all of these prescriptions were filled at Mr. Waxman's drugstore, were they?

A. Your question is a little ambiguous, the first part of your question was. You are talking about prescriptions filled at Mr. Waxman's store. Now you have gone up on another part, and if you will separate them I will answer it.

Q. I will rephrase the question, if you want. All of these [fol. 230] prescriptions that you checked that were issued in Dr. Needelman's office during the period involved, August 6th to September 22nd, they were not all filled at Mr. Waxman's pharmacy?

A. No, sir.

Q. Do you know how many were issued and how many were filled at the Medical Arts Pharmacy, not counting the Bruches?

A. Besides the prescriptions which have already been discussed here?

Q. That's right.

A. I found twenty-eight others.

Q. They were in other pharmacies, were they not?

A. Yes, sir.

Q. Milton Medical?

A. That was one.

Q. How about Miami Beach Pharmacy?

A. No; didn't find any there.

Q. Lee's?

A. Didn't find any at Lee's.

Q. Benson's?

A. Yes.

Q. Do you know if Mr. Wafers may have found some at Lee's or the Miami Beach Pharmacy?

A. I think it is safe to say that if he had found any I would know about it.

[fol. 231] Q. Eliminating the Bruches, whose prescriptions were left at Mr. Waxman's pharmacy, would you want to approximate what percentage of the prescriptions which were issued by Dr. Needelman's office during the period he

was on his vacation,—what percentage of them were filled at Mr. Waxman's?

A. That I found?

Q. Yes, sir. What percentage is Mr. Waxman's prescriptions? What percentage does that fill of the total number of prescriptions that you found were issued by Dr. Needelman's office, excluding the Bruches?

A. If I could look at my report I can tell you exactly. If you want an estimate, let me figure a minute. Which do you want?

Q. Give me an estimate.

A. All right. About seventy-five per cent.

Q. Were filled at the Medical Arts Pharmacy?

A. Yes, sir.

Q. I will tell you what I would rather you do. I would rather you look at the book. Didn't you get twenty-three from Milton Medical?

A. If my memory is right, twenty. I could check my files and tell you exactly, if you want to know; otherwise, I will give you the best I recall.

Q. You don't have to check your file. You just refresh your memory.

[fol. 232] A. It is not my writing. It bears the signature of an agent of mine.

Q. Mr. Waters?

A. Twenty-three prescriptions. I had it pretty close.

Q. Do you know about how many you got from Benson's?

A. Five or six.

Q. Doesn't that refresh your mind. You didn't come close that time Mr. Rudd.

A. It is not my—

Q. I am trying to refresh your memory, that's all.

A. This amount could be correct and could not be. If my memory is right, it is about six.

Q. Do you have any record as to how many you got from Benson's?

A. Yes.

The Court: Step down and get it.

(Witness complies.)

Mr. Cline: Your Honor, Mr. Rudd tells me the information is not available in the courtroom but he can get it later on.

The Court: All right. Bring in the records after you are excused from the witness stand.

By Mr. Roberts:

Q. Let me ask you, Mr. Rudd. Excluding the Bruches [fol. 233] prescriptions, do you recall that you found that there were one hundred eighteen prescriptions issued out of Dr. Needelman's office during that period of time and only fifty-seven were filled by Medical Arts Pharmacy?

A. Before I can answer that question I would have to examine the list of figures in my report. Now you are saying something about sixty-seven and a hundred and fifty-seven or eighty, or something. The number could be off, but I have given you an estimate of the whole business excluding the Bruches, thirty or forty. If you want me to examine my files I will examine them and give you the figures.

Mr. Roberts: I wish you would, sir. Later on you will have an opportunity to get them. We do not want to interrupt the trial here. During the recess perhaps you can get them.

By Mr. Roberts:

Q. When did you first get to know Abe Bruches?

A. I have never talked to Abe Bruches in my life.

Q. When did you first get to know Lottie Bruches?

A. I first heard about these people about 1952 but have never talked to them.

Q. When did you first get to know Renee Pollack?

A. I never met Renee Pollack. Never heard about the person, as I testified here, until this case.

Q. When did you first get to know Harvey Sachs?

[fol. 234] A. Harvey Sachs, I got to know him while examining the files in my office—

Q. I am not asking you that. I am asking you when did you get to know him.

A. You said when did I get to know of him.

Q. No. I said when did you get to know him?

A. I have never met the man.

Q. When did you get to know Fidele Garcia personally?

A. That has been some time ago. I have run into him on a number of occasions. The first time would probably be about two years ago. Before that. Yes, before that.

Q. When did you first get to know personally Gerald Miller?

A. I arrested him in 1949 in Miami Beach.

Q. When did you first get to know Alice Buononito?

A. The first time I ever got to know her was when I arrested her husband for violation of the narcotic law. I cannot remember the date. About three or four years ago. I could check it up.

Q. Do you know what Renee Pollack's physical condition was on August 6, 1955?

A. No, sir.

Q. Do you know what Harvey Sachs' physical condition was on August 6, 1955?

A. No, sir.

Q. Do you know what Abe Bruches' physical condition [fol. 235] was on August 6, 1955?

A. No, sir.

Q. Do you know what Lottie Bruches' physical condition was on August 6, 1955?

A. No, sir.

Q. Do you know what Fidele Garcia's physical condition was on August 6, 1955?

A. As a doctor or as a narcotic agent?

Q. I am asking you if you know what his physical condition was, whether he was sick or whether he was well, or whether he was suffering. Whether he had any pain or whether he was not suffering and had no pain. Do you know that? I make no difference between your knowledge of Fidele Garcia's condition on August 6, 1955 than I do for the others of whom I asked you and you were able to say, "No, sir."

A. I saw Fidele Garcia on or about August 6th. Not to talk to, but observe him, and I want to give the best answer I can.

Q. Do you know whether he was suffering or not?

A. No, sir, I don't.

Q. Do you know what Alice Buononito's physical condition was on August 6, 1955?

A. No, sir.

Q. Do you know what Gerald Miller's physical condition was on August 6, 1955?

A. No, sir.

[fol. 236] Q. What date was it you told me you arrested Gerald Miller?

A. I didn't say the date. I said I arrested him in 1949.

Q. That is the date, Mr. Rudd, 1949, is it?

A. That is the year.

Q. When did you see him again after that, if you recall? Let me ask you this: When is the last time you have seen him?

A. I see him quite often.

Q. When is the last time you have seen him?

A. About six months ago.

Q. Where did you see him?

A. Tenth Avenue just this side of Fifth. Right across from Powell and Company.

Q. I notice that these pictures have "Miami Beach Police Department" on them. Is that where you got these pictures?

A. I cannot recall. One or two I know I got over there. The others I got from my files. I imagine that one there is from the Miami Beach Police Department. That is apparently a Miami Beach photo also. That one is Miami Beach Police Department. That one is Miami Beach. That one is and that one is (indicating).

Q. The one that is Abe Bruches doesn't have Miami Beach on it?

A. That is either New York or Miami Beach.

Q. Do you know, as a matter of fact, Mr. Rudd, that before anybody can secure a position on Miami Beach they [fol. 237] have to go down to the Police Department and get fingerprinted and photographed to get a permit to work on the Beach?

A. There is a registration law but I don't know whether it is before or after. I don't know.

Q. That is particularly so, isn't it, for people like barbers and people who handle food, where things can get contaminated?

A. I do not know.

Q. Beauty parlors?

A. I do not know the purpose of the law.

Q. You just know it is there.

A. Yes, sir.

Q. Would you say to the best of your knowledge, Mr. Rudd, that this is the cash book or daily record book that Dr. Needelman showed you at the time you were over in his office in September, 1955?

A. Well, sir, I couldn't even say whether it is the same book he showed me. He showed me a book similar in structure to that, but I couldn't say whether it is the same book or even the same papers.

Q. At the time that he showed it to you did you examine it with any degree of care?

A. I was not interested in any information other than the names and dates of the entries of the names which we are talking about.

[fol. 238] Q. I think you testified that there was twenty dollars for Fidele Garcia.

A. I don't know whether there is in that book. I haven't examined that book. There was in the book he showed me.

Q. In the book that he showed you did you find any item of more than ten dollars for Fidele Garcia during the period of that year that Dr. Needelman was present in his office, just prior to August 6th when he left on his vacation?

A. I didn't look for that period prior to August 6th. Could have been and not been. I don't know.

Q. Well, why did you just want to start at August 6th, Mr. Rudd; if you thought there was some more violations prior to August 6th wouldn't you have looked for those prior thereto?

A. Well, Dr. Needelman was at his office and in town and present and available to be in personal attendance, but from August 6th to September 22nd he was not present and available. Therefore, those are the dates I was interested in and did inquire about.

Q. Weren't you interested to see if the doctor issued prescriptions, two prescriptions on any one day, for Fidele Garcia while he himself was in Miami Beach in his office?

A. Not particularly so.

Q. You weren't? You just wanted to know if there were two or more prescriptions issued by the office while Doctors Grier and Szekely were in charge?

A. No. I had heard on the 22nd that there had been some [fol. 239] doubling of prescriptions.

Q. And you weren't interested at all to find out if there was any doubling up going on before Dr. Needelman left on his vacation?

A. He could have done it.

Q. You weren't interested in looking to ascertain whether that was so or not?

A. No, because he was in town, apparently, then. I am interested in the period that he was not.

Q. You just were interested in the time that Doctors Grier and Szekely were in his office?

A. I had no interest at all, sir, and had none and still have not, in Doctors or Grier.

Q. I am fixing the period, Mr. Rudd, to help you along, the period that Dr. Grier and Dr. Szekely were there. You were only interested in that particular period?

A. August 6th, or it was about August 1st, to tell you the truth, until the 22nd.

Q. And you didn't go back prior to that time to see if Dr. Needelman himself ever gave the prescriptions?

A. I may have, but if I did it was just incidental to my main point of inquiry.

Q. If you did you didn't find any time where he did, did you?

A. I might have, but I cannot recall it now, sir.

[fol. 240] Q. Wouldn't you have made just as copious a note if you had found it before August 6th as you did when you found it while Dr. Grier and Dr. Szekely were there?

A. No, sir. The law as affected directly, that's all I am interested in,—the narcotic law.

Q. What time in the afternoon on September 22nd was it that you said you talked to Dr. Needelman in his office?

A. Somewhere in the vicinity of two-thirty.

Q. Do you know what day of the week September 22nd fell on?

A. No, sir.

Q. I will give you a calendar for the year 1955 and ask you if that will assist you in telling you what day of the week September 22nd is.

A. Here it says "Thursday."

Q. Would you dispute that calendar? You dispute everything else. Do you dispute that calendar?

A. I wouldn't trust it with my life.

Q. Do you think that I made that calendar up?

A. You asked me, sir.

Q. And do you dispute it?

A. As man to man, I don't think you would do that, Mr. Roberts.

Q. I am asking you.

A. You might be misled on that calendar, but I don't [fol. 241] believe you would intentionally attribute such a falsity to me—not you.

Q. What date does that say September 22nd fell on?

A. Thursday.

Q. When you went over to Dr. Needelman's office did you see his sign on the door, what afternoon during the middle of the week he is not in his office, do you recall that sign on his office door?

A. No, sir. It very well could have been.

Q. He does close on Thursday, doesn't he?

A. I don't know, sir.

Q. You made copious notes, did you not, at the time you started the investigation of this case?

A. I made several notes, yes, sir.

Q. And you have refreshed your recollection from the notes that you made; refreshed your memory? Before coming to testify you refreshed your memory by reference to those notes, did you not?

A. Yes, sir.

Q. How many patients did you see double fees for as to the entries for two prescriptions, for how many different patients did you notice that in that cash book, if you recall?

A. I recall only one name, sir, Garcia, at this time. A year and a half later I can only recall one.

Q. By the way, Mr. Rudd, what other documents or office [fol. 242] records did Dr. Needelman show you when you were there in the office, September 21st, 22nd or 23rd or whatever the dates may have been? Do you recall him showing you any other records?

A. He didn't show me any other records.

Q. Do you recall him showing you the medical histories of various people involved?

A. He did not.

Q. You know you saw these identified by Miss Rossman and Miss Fredericks the other day?

A. Yes, sir.

Q. Those were not exhibited to you at that time?

A. I didn't ask him.

Mr. Roberts: That's all.

By Mr. Chappell:

Q. Mr. Rudd, in your official position as a narcotic agent for the Treasury Department, do you go around and visit and inspect the narcotic prescription files in various drug-stores?

A. Yes, sir.

Q. When did you inspect Mr. Waxman's narcotic prescription file before this?

A. A long time. I could give an exact time. I couldn't give an average of the times previous over there except one occasion, but it has been quite a while since I, A. C. [fol. 243] Rudd, had examined his file.

Q. How many assistants, if you know, have you?

A. At this time?

Q. At the time in 1955.

A. Two.

Q. You had two assistants under you?

A. Yes, sir.

Q. They do the same type of work as you do, do they not?

A. No, sir. One of them only does what we call street work, out on the street.

Q. You said it has been quite some time you had checked his narcotic prescription file?

A. Yes.

Q. Give us some idea of what you mean by "quite some time" I don't mean exactly.

A. About a year, I would say. Just a guess, previous to this case.

Q. And you did go through his narcotic prescription files at that time?

A. Well, the time I would examine any druggist's file, sir, I would go through it on recent dates.

Q. How long a time before that one year had you likewise examined the prescription narcotic file?

A. I cannot say, sir. I cannot remember now.

Q. Now, the State has a narcotic investigative agent do [fol. 244] that; is that right?

A. Yes, sir.

Q. How many men compose that investigative bureau?

A. Two that is in this area.

Q. Do they likewise go around and investigate and inspect narcotic prescription files and so forth?

A. Yes, sir.

Q. You wouldn't know when they had investigated Mr. Waxman's narcotic prescription file, would you?

A. No. They could be doing it every day for all I know, maybe, for a long period of time.

Q. They have similar duties except they are employed by the State of Florida, and you are employed by the United States?

A. Yes. The law is identical.

Q. You heard; I believe, the reading of the testimony of Mr. Kamisarow where he stated that on three or four occasions that when they were out of this prescription of a particular type of medicine that was called for in the Bruches' prescription that they went out and had them filled elsewhere? I believe you heard that.

A. Yes, I recall that.

Q. You recall that?

A. Yes, sir.

Q. Now, Mr. Rudd, in your examination of other drug-

[fol. 245] stores did you find any of these Bruches' prescriptions that had been filled in any of those drugstores?

A. No, sir.

Q. Did you check?

A. To look for any?

Q. Yes.

A. No, sir.

Q. You didn't look for any?

A. No, sir.

Q. If Mr. Kamisarow's testimony was correct and he came to Mr. Waxman's drugstore and they were out of that particular type of drug called for and they gave him the prescription, that would have been, so far as you know, on one of the so-called printed forms, would it not?

A. The offset printed forms, yes, sir. If the purported prescription had been given to one of the Bruches during the period August 6th to September 22nd, all I can say, I presume it might be one of those offset ones.

Q. Did you check to see if there were any of them missing in the Waxman's pharmacy?

A. I had no way of knowing what would be missing from his store. I wouldn't know.

Q. Let me ask you this question: These prescriptions which you claim you picked up from other stores, twenty-three others: Milton's Pharmacy, Milton Medical, were any of those for the Bruches?

[fol. 246] A. No, sir. There were no Bruches' prescriptions found only on the one location.

Q. That is during this period of time that you are talking about?

A. Not at that time.

Q. Now, you testified that you found one prescription for morphine written to Lottie Bruches.

A. No, I believe it is Abe Bruches. I don't believe I said Lottie Bruches.

Q. Have you got it right here on your desk?

A. I should have it there if it isn't upstairs.

Q. That is the one you said was written by Dr. Greene?

A. It was written by a doctor other than Dr. Needelman.

Q. I thought you said it was written by a Dr. Greene.

A. I didn't say anything about Dr. Greene.

Q. Let's find out what doctor wrote it. Is this the prescription that you had in mind?

A. Yes. This is the one we have been talking about.

Q. Who was that written for?

A. Abe Bruches.

Q. Who wrote that prescription?

A. I would have to examine it, sir. There is a signature of one Greene. Something Greene, Dr. Irvin M. Greene. I don't know who actually wrote it.

[fol. 247] Q. Do you know who Dr. Greene is?

A. Do you mean whether I know him personally?

Q. Do you know whether he is an M. D. or not? Does he have a narcotic license?

A. He shows a registered name which means that he is registered and permitted to write anybody prescriptions, so we can only assume that this doctor does have a narcotic license.

Q. What was the date he wrote that prescription for Abe Bruches?

A. September 15, 1955.

Mr. Chappell: All right.

The Court: Anything further?

Redirect examination.

By Mr. Cline:

Q. Mr. Rudd, at what drugstore was this prescription filled, this Greene one?

A. Medical Arts Pharmacy.

Q. What is the prescription for?

A. Ten one-grain morphine sulphate tablets.

Q. In connection with your examination and your investigation of this case, did you run across any prescriptions or alleged prescriptions for any of these seven persons executed by either Dr. Grier or Dr. Szekely, "Not for charge"?

A. None, sir.

[fol. 248] Q. Is this book or any book similar to it indicating the doctor's fee in that record required to be kept by the Federal Narcotic Bureau?

A. No, sir.

Mr. Cline: That's all. Thank you, Mr. Rudd.

(Thereupon, a short recess was had, and the jury retired from the courtroom.)

DENIAL OF MOTION FOR PRODUCTION OF NOTES

The Court: I will deny the request for the notes, because they may involve many things. You may see the case report.

(Thereupon, the jury returning to the courtroom and counsel conceding that the defendants were present and waiving polling of the jury, the following proceedings were had.)

The Court: Can you give us those figures?

Mr. Rudd: Approximately sixty-six per cent filled at Waxman's drugstore?

Mr. Rudd: Sixty-six per cent of all the prescriptions dispensed from Dr. Needelman's office during the period August 6th to September 22nd, regardless of all these—re-
[fol. 249] gardless of what store, sixty-six per cent were filled at Mr. Waxman's store.

Mr. Chappell: Did that include the Bruches?

Mr. Rudd: No, sir, it does not include the Bruches.

Recross examination.

By Mr. Roberts:

Q. How many did you get from pharmacies other than Mr. Waxman's?

A. During the period August 6th to September 22nd, that period only, there were twenty in one pharmacy, four from another and eight which could be identified at all from Benson's. Six more taken from Benson's which cannot be identified as to what year they were written, because there was absolutely no date, therefore, they are entirely discarded as far as I am concerned. They could be written in 1898—

Mr. Roberts: I object to the witness making a speech to the jury.

The Court: The jury will disregard everything but the numbers.

The Witness: Eight dated and signed by the doctor during the period August 6th to September 22nd.

By Mr. Chappell:

Q. Did I understand you to say of your accord that you were discarding certain number of prescriptions filled at other drugstores because they were not dated?

[fol. 250] The Court: That's right.

By Mr. Chappell:

Q. Did it show when they were filled?

A. No.

Q. Do you know where these were filled?

A. No, sir. All I can say is where I found them, but actually where they were filled, I would not know.

Q. Who wrote this on the back of these prescriptions, "No. 'so-and-so' was filled on August 8, 1955"; who wrote that?

A. This is my handwriting, sir.

Q. Didn't you state there that it was filled on such-and-such a date in August, 1955?

A. Yes, sir. I say that because this number of 2369 was filled on August 8th, because that is what the druggist's records other than this show, that that prescription was filled on that date, although it is not dated at all.

Q. What drugstore was that taken from?

A. That one was found at Benson's. Whether it was filled there or not, I do not know.

Q. It was found in their narcotic prescription file?

A. Yes.

Q. Look at the next one. Who wrote that?

A. I wrote that with a typewriter and put my initials on it.

Q. What date was that filled?

A. This was filled September 18, 1955.

[fol. 251] Q. At what drugstore?

A. I found this on the Benson's drugstore file.

Q. Are there any more notations on the back of it?

A. Except for my initials and the date, that's all.

Q. Benson's store, that is a pharmacist on Miami Beach?

A. Whether they had a pharmacist or not, they had a tax stamp. It is not my official business whether they have a pharmacist or not.

Q. They did have a narcotic tax stamp?

A. They did at that time, yes, sir.

Mr. Chappell: That's all.

Mr. Cline: That's all.

Thereupon: EDWIN S. WATERS was called as a witness on behalf of the Government, having first been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Cline:

Q. State your name, please.

A. Edwin S. Waters.

Q. What is your occupation?

A. Federal Narcotic Agent.

Q. How long have you been a Federal Narcotic Agent?

A. Since January 3, 1955.

[fol. 252] Q. And you were so employed during the months of August and September, 1955?

A. That's right.

The Court: Can it not be stipulated that this agent was the one that was associated with Mr. Rudd, whose name has been mentioned several times as being present in the conversation?

Mr. Roberts: Yes, sir.

Mr. Chappell: Yes, sir.

By Mr. Cline:

Q. Were you present during the period that Mr. Rudd interviewed Mr. Waxman and Dr. Needelman on or about the 22nd of September, 1955?

A. I was.

Q. Where did that conversation with Mr. Waxman take place?

A. In the Medical Arts Pharmacy.

Q. Do you recall approximately the time of day when you talked to Mr. Waxman in the Medical Arts Pharmacy?

A. I don't recall the specific time. It was probably some time late afternoon of that day.

Q. What time and whereabouts did you talk to Dr. Needelman on that day?

A. In Dr. Needelman's office on Miami Beach previous to talking with Mr. Waxman.

[fol. 253] Q. Did you accompany Agent Rudd to the Medical Arts Pharmacy at any time prior to your conversation with Dr. Needelman in his office?

A. I did.

Q. What, if anything, did you do or say, or did Mr. Rudd do in your presence at the Medical Arts Pharmacy before your conversation with Dr. Needelman on the 22nd?

A. Agent Rudd and Mr. Bellinger and myself went to the Medical Arts Pharmacy. It was in the early afternoon or around noon time, I am not sure, on that date. And Mr. Rudd asked for Mr. Waxman; and it was Mr. Kamisarow that was behind the drug counter there. Mr. Kamisarow stated that Mr. Waxman was not there—

Mr. Chappell: I object to any conversation that took place with Mr. Kamisarow not in Mr. Waxman's hearing and presence.

The Court: I sustain the objection.

By Mr. Cline:

Q. What did you do on that occasion?

A. I witnessed Mr. Rudd take the narcotic prescription file and the prescriptions that were seized at that time, or alleged prescriptions, and I initialled those prescriptions for future identification.

Q. Then what did you do?

[fol. 254] The Court: I take it we can stipulate that the same prescriptions Mr. Rudd talked about are the ones initialled, and that he did initial them?

Mr. Chappell: Yes, sir.
Mr. Roberts: Yes, sir.

By Mr. Cline:

Q. What did you do after you left the Medical Arts Pharmacy?

A. We went over to Dr. Needelman's office which is just about a block or so away.

Q. Who was present?

A. Mr. Bellinger, Agent Rudd and myself went into Dr. Needelman's office and Dr. Needelman was there and Dr. Szekely was there and some other man, I think, was also in the office. I don't know who that was.

Q. What was the gist of the conversation that took place in Dr. Needelman's office at that time?

A. Agent Rudd introduced himself and Mr. Bellinger and myself to Dr. Needelman and we identified ourselves and Agent Rudd told Dr. Needelman he was making an official inspection of his narcotic activities—his present narcotic activities—and asked Dr. Needelman if he had any objection to answering any questions. Dr. Needelman replied he did not. He did not have any objection at all. Mr. Rudd then showed him the prescriptions we had just taken from the Medical Arts Pharmacy and asked him, [fol. 255] "What about these prescriptions?" Dr. Needelman said, "Yes, these addicts—" referring to the people as "addicts"—there was quite a conversation ensuing between Dr. Needelman and Mr. Rudd mostly, and Agent Rudd asked him about these prescriptions, and Dr. Needelman said he thought it was wonderful that these addicts were only taking Methadon,—that they were known heroin and opium users and that heroin on the street was sold at exorbitant prices, and they could go about their daily work without going on the street and getting other narcotics. Mr. Rudd asked him if he had discussed with any of them about Lexington, or taking the cure at Lexington, and Dr. Needelman said that most of them would not or could not go there, because they had to work, and so forth. There was some discussion in regard to the amount of dosage per prescription and Mr. Rudd asked the doctor, did he treat

anyone else other than these patients with narcotics. He said he had, but only on rare occasions. And it was ascertained that the Doctor felt that one Methadon tablet consisted of one dose of narcotic.

Q. Was there any discussion about the method of handling the prescriptions while Dr. Needelman was on his vacation in Europe?

A. The Doctor said he left the prescriptions with the girls in the front office, the office girls, to give out to these addicts as they called for them; and Mr. Rudd asked him if [fol. 256] he had told the addicts—if there was any specific time they should come, and he said, "No, they came when they felt they needed it and the office girls collected the fee." Then Dr. Needelman explained that he left some of these prescriptions at the Medical Arts Pharmacy for Abe and Lottie Bruches, Codeine prescriptions, and there was an arrangement made there for the Medical Arts Pharmacy to fill these prescriptions as the Bruches called for them, and he collected five dollars, or two-fifty, at the time, depending on the number of prescriptions, and that he had this collected or had this received from the Medical Arts Pharmacy,—that he had just received from the Medical Arts Pharmacy, one hundred seventy-five dollars which the Medical Arts Pharmacy had collected as his fee while he was absent from the office. He then produced voluntarily the unused prescriptions that he just brought back from the Medical Arts Pharmacy,—the number over and above what the Bruches had used there.

Q. Was there any conversation on the part of Dr. Needelman as to why he had left the Bruches' prescriptions at the Medical Arts Pharmacy and left the others in the office?

A. Because the Bruches, he said, got off of work quite late, later than his office hours. That they could not walk around to the office before he closed, and that is the reason he left it at the Medical Arts Pharmacy.

Q. After you left the Doctor's office on that day what then [fol. 257] did you do?

A. We then went back to the Medical Arts Pharmacy.

Mr. Chappell: In order to keep the record straight, at this time I will object to all this testimony upon the ground

that it immaterial and irrelevant as far as the defendant Waxman is concerned, and respectfully request the Court to instruct the jury that it is not binding on him, if it is not in his hearing and presence.

The Court: I will overrule the objection, and I will instruct the jury on the law at a later date.

By Mr. Cline:

Q. You say you left Dr. Needelman's office and returned to the Medical Arts Pharmacy?

A. Right.

Q. What took place at that time and who was present, to the best you recall?

A. Mr. Waxman was there, Mr. Kamisarow was there, and Mrs. Waxman was also there, if I recall; and Agent Ruff asked Mr. Waxman—

Mr. Roberts: I object to the conversation.

The Court: All right. Same ruling. Overruled.

[fol. 258] The Witness: Mr. Rudd asked Mr. Waxman if he had any prescriptions there in the drugstore for the Bruches or anyone else. He first looked in the safe and asked Mr. Kamisarow if there were any more prescriptions left. And Mr. Kamisarow said, "No." He had given one hundred seventy-five dollars and the unused prescriptions to Dr. Needelman previously that afternoon.

By Mr. Cline:

Q. Was there any more conversation there at the drugstore that afternoon when Mr. Waxman was present?

A. There was not anything specific that I can recall other than Mr. Waxman wanted to know what was going to happen, and Mr. Rudd said at that time he didn't know, he was just making an official inspection there.

Q. On the occasion of your interview with Dr. Needelman in his office was there any conversation on the part of Dr. Needelman with regard to the instructions, if any, that he had left with the nurses in his office regarding the amount of prescriptions that were to be issued to the various so-called patients and the amount that was to be charged for these?

A. Yes. Mr. Rudd asked him about that and Dr. Needelman stated that he instructed the office girls that when these addicts came during the day or when they came to the office they were to give them—date the prescriptions and give them to them and collect the specified amount,—[fol. 259] ten dollars or five dollars, depending upon the person.

Q. Do you recall any conversation on the part of Dr. Needelman what was the normal dosage of any of these narcotics?

A. Yes, a discussion regarding the amount of dosage, and Dr. Needelman agreed that one tablet was considered one dose.

Q. Calling your attention to the date of September 28th, what, if anything, did you do in connection with your official investigation of this case?

A. On that particular day I accompanied Dr. Needelman and Mr. Bellinger to the Medical Arts Pharmacy on Miami Beach and Mr. Waxman was there, at which time Mr. Rudd asked him a number of questions regarding this matter of the filling of prescriptions.

Q. What did Mr. Waxman have to say about his part in these instructions?

Mr. Chappell: Don't lead the witness. I object to it.

The Court: Sustained.

By Mr. Cline:

Q. What conversation took place between Mr. Waxman and Agent Rudd on that date?

A. Mr. Rudd asked Mr. Waxman about the situation in regard to these prescriptions that were taken from his drugstore and written by Dr. Needelman, and Mr. Waxman said that Dr. Needelman had, prior to leaving on his [fol. 260] vacation on August 6th, on or about that date, that he had appeared at the drugstore with a number of prescriptions and that Dr. Needelman asked him—Mr. Waxman—if he would handle the prescriptions there,—that is, when the addicts came in for the prescriptions, to take and fill them and collect his fee. And Mr. Waxman stated at that time that he told Dr. Needelman that he

wouldn't handle the Methadon prescriptions. That he would only handle prescriptions for the Bruches because it was only Codeine. He said, "I must have been stupid to do this for Dr. Needelman."

Q. Did you have any conversation with Mr. Waxman in regard to the persons who were the recipients of the various narcotics?

A. Yes, I believe on that date Mr. Waxman identified the mug shots or photos of these people as the ones that were obtaining the prescriptions at the drugstore.

Q. Are these the photographs that you refer to?

A. Yes.

Q. Do you recall any further remarks made by Mr. Waxman regarding conversations that he had with Dr. Needelman regarding these various prescriptions?

A. Dr. Needelman, as I say, filled out all the prescriptions and wanted Mr. Waxman to handle them, and Dr. Needelman told him not to worry, these were registered with the Bureau of Narcotics.

[fol. 261] Mr. Cline: Your witness.

* * * * * * * *

[fol. 337] Dr. Harry Needelman was called as a witness in his own behalf, and having first been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Roberts:

Q. What is your name?

A. Harry Needelman, M.D.

Q. Where do you live, Doctor?

A. 310 East DiLido Drive.

Q. That's on Miami Beach?

A. That is correct.

Q. What is your profession, sir?

[fol. 338] A. I am a general practitioner.

Q. Are you licensed to practice in the State of Florida?

A. I am.

Q. Under the Treasury Department do you have what is called a narcotic license to dispense narcotic drugs?

A. I do, and have had since I have been in practice for the last nine and a half years. I am a graduate of Middlesex University in 1938.

Q. And have you had a large practice in Florida since that?

A. Since January, 1948.

Q. Are you licensed to practice in any other state?

A. Yes, I have been licensed to practice in Massachusetts since 1939 and the State of New York since 1946.

Q. Are you married, Doctor?

A. I am.

Q. Any family?

A. Yes, I have a wife and two children. A little girl of eight and a boy almost five.

Q. Were you in the military service of the United States during the last war?

A. Yes, I was.

Q. In what capacity?

A. I was Battalion Surgeon with the Texas Division of the 26th Infantry Division, and saw active service and am [fol. 339] proud to say I was the first American doctor to land in the invasion of Europe.

Q. How long were you in the Service?

A. I was in the Service for three years and nine months, serving almost three years overseas.

Q. When you returned from Service, where did you practice?

A. When I returned from the Service, I took an additional year of training at the Jewish Sanitarium and Hospital in Brooklyn before coming down to open my office here.

Q. And you have been in the same office? Is that correct?

A. The same place for almost ten years.

Q. Doctor, on August 6, 1955 did you and your wife take a vacation?

A. Yes, sir, we did.

Q. About how long were you gone?

A. We were gone for seven weeks although we had anticipated being gone for perhaps ten weeks.

Q. You cut your vacation short?

A. Yes, sir.

Q. Do you know a Dr. Szekely?

A. I do.

Q. When did you first know Dr. Szekely?

A. I first met Dr. Szekely in 1946 when he and I were residents of the Jewish Sanitarium in Brooklyn. At the time when I left there Dr. Szekely went into practice in [fol. 340] 1947 in New York City and I came down here to take my examination to practice in Florida.

Q. At that time, then, he was a practicing physician in New York?

A. Yes; Dr. Szekely had been practicing in New York for about six or seven years before coming to Florida.

Q. Do you know the circumstances of his coming to Florida?

A. Yes, I do. Dr. Szekely had a very successful practice in New York. He decided he would like to practice here in Florida. However, he was a graduate of a foreign school, graduating in Italy, and he wished very much to practice in this state. He wrote to Dr. Homer Pearson, Secretary of the Medical Board, who informed him that as a foreign graduate he would have to spend at least two years here in an approved hospital. Dr. Szekely wrote to every approved hospital in the State of Florida and was refused admission by every hospital he wrote to. After being refused at Mt. Sinai, where I have an active standing, I approached three members of the Board at Mt. Sinai, Dr. Marks, Dr. Nathan and a third doctor, and asked that they should reconsider admitting Dr. Szekely to the hospital. This they did and wrote him a letter telling him they would admit him as a resident to the Mt. Sinai Hospital.

Q. He was admitted?

A. He was admitted to the hospital and after two years [fol. 341] of staying with the hospital he was permitted to take an examination to practice.

Q. Do you recall the date when he took his examination to practice?

A. He took his examination to practice in the fourth week of June, 1955.

Q. Now, ordinarily, Doctor do you know how long it takes after one takes the examination before they are either admitted or denied practice?

A. In my own case, it was six weeks.

Q. About six weeks?

A. Yes.

Q. That was in June of 1955 when he took his examination, so ordinarily, six weeks later he would either be admitted or denied?

A. He should have had his license to practice approximately the 1st of August of 1955.

Q. Now, at that time were you contemplating taking your vacation on or about August 6th?

A. I was contemplating taking my vacation and Dr. Szekely told me that he had spent most of his savings as a resident for two years since the salary was so small in the hospital, and he was most anxious to see if he couldn't derive income so as to have money to open his office, and I offered to let him take over my practice during my vaca- [fol. 342] tion and give him a chance to take over a very nicely run practice where we saw between thirty and forty patients a day.

Q. Tell me what arrangements you made with Dr. Szekely and Dr. Grier about your office while you were on your vacation that summer.

A. The arrangements were for Dr. Szekely, as soon as he got his license, to come into the office and derive forty per cent of the total income or to guarantee him a minimum of one hundred twenty dollars a week. He should earn much more than that—I certainly felt he should during the time that I was away. Now, we had expected Dr. Szekely to receive his license, as I say, any time from August 1st, and when August 5th arrived and Dr. Szekely still didn't have his license, I became quite concerned, and I immediately started calling other doctors in the area who might be kind enough to come down and adopt the practice until Dr. Szekely got his license, so that he still could go ahead and earn money he needed to open an office. After I called perhaps twenty or twenty-five doctors we came to Dr. Grier, and he told me on the telephone—I ex-

plained the forty per cent situation to him—and he told me he would be happy to do either one or two things, to either run the office until Dr. Szekely got his license, or if Dr. Szekely didn't get his license, he would be willing to stay in the office for the total period I was going to be away [fol. 343] from the office. I explained to Dr. Grier also that I had planned a seven week trip to Europe, and that perhaps if I would come back and be tired, I might want an additional three weeks to rest, and would he be prepared to spend ten weeks in the office. He said he would be happy to. Dr. Szekely also said he would be happy to spend ten weeks in the office. The day before I left Dr. Grier told me on the telephone he would be happy to come down to the office, but he still had some patients of his own. This was Friday, and he would come in on Saturday to take over with Dr. Szekely. Dr. Szekely didn't come into the office until Saturday at twelve o'clock noon because he still had some patients Saturday morning, so I barely had a chance to speak to Dr. Grier before he came to the office. He understood he was to receive forty per cent of the total income until such time as Dr. Szekely got his license, at which time Dr. Szekely would take over his practice.

Q. When you left on your vacation on August 6th you left two doctors in your office. Dr. Grier and Dr. Szekely?

A. I left two doctors, but Dr. Szekely had come in a week before I left so he would become totally acquainted with all the patients in my office, learn the procedures of the office, learn the methods of treatment and how to set a fee, because it is our custom in the office and is today, that a nurse never sets a fee in our office. The doctor is [fol. 344] the sole person who decides what a person should pay upon a visit or treatment, so far as the charge to the patient. So that Dr. Szekely was taught—I never had a chance to speak to Dr. Grier—the code of "Dick Murphy" A fee of fifteen dollars, "DM" would be written on the card. This was explained to Dr. Szekely and he got to know the patients and I wanted the patients to feel before I came back, they were not total strangers to the doctor and he was familiar with the case and they would feel perfectly at home coming into the office.

Q. Now, Doctor, does it take a little longer to get a narcotic stamp from the Federal Government after you have once been admitted to practice?

A. Yes. After being admitted to practice you then must first apply for your narcotic stamp, and a narcotic stamp sometimes takes a month and sometimes two or three, until it comes through. I think Mr. Rudd may be able to testify as to that.

Q. If Dr. Szekely had gotten his medical license from the State of Florida to practice medicine, Dr. Grier, would he leave the business and let Dr. Szekely take over?

A. That is correct.

Q. But then there would be a period thereafter when Dr. Szekely, although licensed as a physician to practice in Florida, would not have his Federal narcotic stamp. Is [fol. 345] that correct?

A. That is correct.

Q. Now, to take care of that situation what did you do about writing some prescriptions in advance for your patients that you knew would need such narcotic prescriptions during your absence?

A. I think the jury has already heard that most of the patients I had been treating, of course, I treat about ten thousand patients a year or more; but of those ten thousand there are eight people involved here who I have been treating for many years. There were one or two I had been treating for a very short time before I left, but most of them had been under my care for years, and they were getting non-addictable narcotics that you have heard about—Codeine, Demerol and Methadon, and on leaving I prepared those prescriptions which I understood previously from a Mr. Johnson, the State narcotic officer, that it was perfectly all right to provide prescriptions for your patients. If you are going on a vacation to write on the prescription the date that you signed the prescription, and you could authorize your clerk or your nurse or any agent to go ahead and write the dates on the top of the prescription and the words, "To be filled," and after that, the date the patient received the prescription—those prescriptions were left with Dr. Szekely and not with the nurses, as has been [fol. 346] testified. There was nothing left with the nurses

at any time, and there were never any instructions given to the nurses in regard to fees, because, as stated, the doctor would examine the patient each and every time, and then designate whether the patient should receive a prescription at that particular time. If he thought the patient would need it, he issued it. And if he thought the patient didn't need it, he would not issue it. And this Doctor was not a little pin brain out of school; he is forty-four years of age and knows how to conduct a practice. So that these prescriptions were left with Dr. Szekely, not with the nurses. And when I left them with Dr. Szekely, of course, Miss Rossman, as you heard, was there. I had been writing the names of the patients on the prescriptions all that morning. I came in very early and I must have written about two hundred prescriptions for the Bruches and other patients, and I was just about exhausted, and I said, "Will you please sit down, Miss Rossman, right next to me and put against each and every prescription the words, "To be filled". "I will write a few and you do as many as you can," which Miss Rossman did. Now at that time the question arose that Dr. Szekely and Miss Fredericks were nowhere in the vicinity when this happened. She said she received instructions. Dr. Szekely said, "Well, now, if you prepare these prescriptions they are for narcotics. Even if they are mild they are still narcotics. What shall we do [fol. 347] with them?" I said, "Lock them in the drawer." I had this metal furniture in this office, and the only drawer in the entire office was the cash drawer in the nurse's desk in the front reception room, and I might add, that besides the cash, we also kept injectable narcotics in that drawer, because we wanted to keep them under lock and key. Dr. Szekely said, "What will I do?" I said, "Put them in the cash drawer, and when you need them and determine a patient needs them, ask the nurse to bring a prescription in to you and issue it to the patient—tell the nurse you are issuing a narcotic and put the date on it." Dr. Szekely agreed to do it, and as far as I know, or as far as I knew, did; and that's as far as my directions to Dr. Szekely was concerned. I never had a chance to speak to Dr. Grier about the thing. I was hoping Dr. Szekely would explain the situation to Dr. Grier if he had failed to pass the ex-

amination, so that Dr. Grier would write his own narcotic prescriptions. Dr. Grier had his own narcotic license, and the question might arise, why didn't he use that narcotic license from the first day he was there; but if I did not leave the prescriptions and Dr. Szekely got his license to practice the day after I left, Dr. Szekely would no longer be able to take care of patients who might require some for the relief of pain. Those prescriptions were prepared in advance. Dr. Szekely was also told if he did not pass the examination, Dr. Grier could write prescriptions, and [fol. 348] they could be destroyed, because there was no need for them. And this was my advice I told Dr. Szekely —that's what actually happened, and nothing else.

Q. Was Dr. Grier paid for the period that he stayed in your office?

A. He was. He received forty per cent of the first two weeks until the time when Dr. Szekely received his license, which was on the 19th of August, I believe.

Q. Dr. Grier received the forty per cent, not the hundred and twenty dollars a week guarantee?

A. No. He received a lot more than that. I have the figures in the book.

Q. Dr. Szekely—when you returned did you have a final settlement with him?

A. Yes. When I returned the practice had dwindled to practically nothing. I gave him his minimum of six hundred dollars and found that during the time I was away I had lost $688.00—lost $680.00.

Q. While I think of it, Doctor, there has been marked for identification as Defendant's Exhibit 1, this book. Will you look at it and tell me what it is?

A. I know this book backwards and forwards, and it is the daily log book for the year 1955, January 1st to December 31, 1955.

Q. When you call it the "daily log book," do you also call [fol. 349] it the daily cash book or the register of patients that come in?

A. Correct.

Q. What is the procedure in making entries in that book?

A. As I have explained, every patient that came in to the office, the patient's name would be written in the book.

Immediately the nurse would draw from the file the proper medical record card of the patient that came in and the patient would present that card or the card would be laid on the desk of the doctor before the patient came in, so he could acquaint himself before the patient came in with what was done previously and know how to handle the case in a more familiar manner. After the doctor had seen the medical record and examined the patient he would make notes as to what he did, what he gave and what he thought, and put down the amount on the medical record what the charge should be for the patient. The patient then leaving the doctor's consultation room, would go to the front reception desk with the card with the fee on the card and the nurse would know then how to charge the patient.

Q. And would enter it accordingly?

A. Would enter it properly in the book.

Q. The records in that book were made from day to day as each day went along; is that correct?

A. This is the daily record, and the nurses made their [fol. 350] entries from the first to the last.

Q. Doctor, I think you testified that you know that book by heart.

A. I do.

Q. Outside of the period between August 6th and September 22nd or 23rd when you returned, is there any entry in there for Fidele Garcia for more than ten dollars?

A. Positively not.

Q. Did you at any time ever give him more than one prescription at a time?

A. No, sir. If I had given him more than one prescription, those prescriptions would be filled at the drugstore, and Mr. Rudd could quickly identify more than one prescription given in the past or in the future or at any other time.

Mr. Roberts: We offer this.

Mr. Cline: No objection.

The Court: It will be admitted.

(Thereupon, the instrument was marked in evidence as Defendant Needelman's Exhibit 1.)

By Mr. Roberts:

Q. Now I hand you an envelope with some cards inside of it, marked Defendant's Exhibit 3 for identification. I am not interested in the envelope, but I will ask you if [fol. 351] these cards, what these cards are that are inside the envelope?

A. This is one of the medical records taken from my office and the record of the patient, Fidele Garcia. He, in 1953 was twenty-six years of age.

Q. Now, when a person first comes in do you start a card like that?

A. We usually do.

Q. And every time he makes a visit—

A. We make an entry onto the card as to what we saw, what we did for the patient, and the fee for the patient.

Q. Now, where are these medical cards kept?

A. These medical records are kept in the front reception room behind the nurse's desk where she may easily reach for them when the patient comes into the office and brings them to the doctor.

Q. Using something specific: Suppose Fidele Garcia came in to see you. What would the nurse do the first thing, as far as this is concerned?

A. She would remove it from the file and bring it to the doctor's office so the doctor can know how many patients are waiting and who the patients are and perhaps refresh his memory as to what was done last.

Q. And the patient would eventually get into your office for examination and consultation; is that correct?

[fol. 352] A. Correct.

Q. And then after you had finished examining and prescribing or treating the patient, then what would happen to the card of the patient?

A. Well, after examining the patient the fee is put on and it is given to the patient who brings it out to the nurse's desk and she marks the fee either "Paid" or "Charge" on the daily book.

Q. That is the medical history of Fidele Garcia; is that correct?

A. That's correct.

Q. Is that from the time he first came to your office until August 6th?

A. Yes, sir.

Q. Do you know if any cards are made for him from August 6th on, any entries or anything?

A. I remember seeing the cards when I came back from my vacation, that I remember having furnished to show to Mr. Rudd with the consultations up to date; but since that time all the cards since August 6th have disappeared with the exception, I believe, of Renne Pollack, Harvey Sachs and Gerald Miller.

Q. But that is Fidele Garcia's medical history?

A. Yes.

Q. From what date?

[fol. 353] A. From December, '53 to August 5, 1955, a period of about two years.

Mr. Roberts: We would like to offer this in evidence.

Mr. Cline: No objection.

The Court: It will be admitted.

(Thereupon the instrument was marked in evidence as Defendant Needelman's Exhibit 3.)

By Mr. Roberts:

Q. Now, Doctor, handing you this exhibit the medical cards of Fidele Garcia, I want you to refresh your mind and tell the jury what Fidele Garcia's medical history and complaint was and what treatment you would give him from time to time.

A. Mr. Garcia's complaint, upon coming in in 1953, was pain in the left anterior chest, and pain between the fifth and sixth left ribs where it met the breastbone. And he complained of pain symptoms upon taking a deep breath and bending or moving suddenly, or when the weather changed. Pressure on this area would cause definite pain and cause the patient these symptoms. You would have a patient turn his head the other way and the patient would not have the symptoms, or if your patient was trying to [fol. 354] fool you, it is pretty had to tell. But when you put your finger on the chest, the exact point where the

patient is paining, we convinced ourselves he did have definite pain where the fifth and sixth left ribs came together with the sternum. And he stated he had been in an accident, and automobile accident, in January, 1952 when he stated his ribs were fractured and that many X-rays had been taken by a doctor, by a number of doctors, and that he was treated by two doctors at that time, which we found out since were Dr. Vogt who is a competent orthopedic specialist. I treated this man in 1953 by putting procaine or novocaine into the area and the places and strapping his ribs, hoping to give him some relief of pain. We weren't very successful at that time, but we did offer some medication to stop his pain which was Methadon. And I further stated that in 1953 there was a lot of literature in the medical journals—I have copies of that—that Methadon given orally was a marvelous drug to stop pain, and had little euphoria. In other words, there would be no kick to it. It was strictly a drug to stop pain and an analgesic agent. We prescribed Methadon at this time for his pain. That was in December, 1953. Then I did not see Mr. Garcia for eight months until August, 1954, when he came in with a similar complaint and since I had not seen him in eight months and he said he had gotten some relief from the last treatment, I again injected procaine into [fol. 355] the arm and strapped him up again, and gave him some diathermy, and this seemed to do very nicely.

Next, I didn't see him from August until November, 1954, which would be three months later, November 10, 1954. He came with the same complaint and I repeated the same treatment, feeling if I could hold the man comfortable for three or four months at a time I was doing good. I gave him similar treatment on November 10th and saw him again on the 30th, which was three weeks later, and he complained of this pain, and I said, "We had better take another X-ray." Take another X-ray to see why his pain had not been relieved with the injections as it had been in the past. Of course, Mr. Garcia at that time refused X-rays and stated that it was all right, he knew what he had: he had these fractured ribs, and as far as he was concerned, he was told by other doctors that there

was some scarring and it would not heal, and perhaps an open operation would help it, and he wasn't in the mood to have anyone open his chest and operate on him at that time. So we treated him on November 30, 1954 and didn't see him again for almost a month until December 28, 1954, at which time we again did the same thing and put in some procaine and strapped him and again suggested X-rays which he refused.

From December 1954, we didn't see him until February 15, 1955, which was about two months later. And after that, on March 11, 1955—from December, 1954 we didn't see him until February, 1955. And then February 15 to [fol. 356] March 11, which was one month after that.

Again I repeated the same treatment. He came in on March 18th, a week later, and March 25th, a week later. I repeated the treatment at that time and then we didn't see him again until April 18, 1955 which was about twenty-four days later, three and a half weeks later. On April 18th, 1955 it occurred to me that perhaps I might try to reduce the infection in the area by giving him some Cortisone drug which we did, and we thought we would give him, put him on Codeine instead of Methadon. The patient told me Codeine upset him and made him sick and nauseous. The Methadon seemed to agree with him, so we kept him on Methadon again.

Q. Is Codeine stronger or weaker than Methadon, or are they about the same?

A. Some people get more relief of pain with Codeine than they do Methadon.

Q. It depends on the individual?

A. Yes. After May 22nd we saw the patient again twenty-two days later, on June 13, 1955, at which time he again had some severe pain, and we gave him similar treatment on June 13th and he came in on June 18th again with a similar pain and we gave him more Aquadiol. This was the first time I had seen him in such a close period. Then it seems he came in two days later and complained of an acute pain across his chest which was aggravated by taking a deep breath or deep breathing, and [fol. 357] I couldn't understand that. But he was running a temperature of 99.6. Some dormant infections are quite

high, and when that happens on top of a broken bone or arthritis, the condition will flare up and the patient will have more pain at that particular time. On June 20th he seemed to have more pain than ever before and we started with Antibiotics to stop his pain. I gave him Penicillin at that time. We saw him again on June 24 for the complaint of his pain, and we gave him some more Antibiotics and I had a new machine. Ultisonic so-called wave therapy, which is used to relieve pain and reduce swelling. By sound waves and actually by applying sound waves, you can reduce a painful condition. We started using the Ultisonic June 27, 28 and July 2nd, 1955. At that time it seemed we were not getting anywhere. His pain was getting more intense rather than getting better, and finally on July 6th, his temperature, in spite of the Penicillin which I gave him, had sprung up to 100.2 and he developed pleurisy in his chest. We changed our antibiotics at that time to see if he would not respond better to something other than Penicillin. We saw him on July 6th, 12th, 15th, 17th, 18th, 20th, 23rd, 25th and 27th and each time we gave him Ultisonic. We thought perhaps the only thing to do now was to have some open surgery to see what was interfering. Perhaps there was some scar tissue in the area of the sternum, and perhaps if that was removed he would heal once and for all. And the patient said [fol. 358] he didn't want to go to surgery at this particular time.

On the 27th we had him come down, the 28th, 29th and 30th, and he had been almost every day receiving treatment, Ultisonic and whatever I thought I could do to treat him to relieve his pain and help his pain—Aquadiol, and during that last week he was seen every day also by Dr. Szekely, who watched with me and agreed with me on the type of treatment I was giving and thought it was the thing to do, and that brought us up to August 5th, 1955.

Q. What is Aquadiol?

A. That is a Cortisone-like drug, which is used for people with rheumatic pain, neuritis, inflammatory conditions in the body. Aquadiol is injectable.

Q. That is not a narcotic?

A. No.

Q. He would need diathermy also?

A. Yes, Ulti-sonic.

Q. Diathermy is what?

A. Deep heat which also helps inflammatory tissue by taking it away. We take pressure off nerves and that way you relieve pain.

Q. And the Ulti-sonic?

A. It is the same thing, except it works by sound waves, and is supposed to be more effective than diathermy.

Q. He was given all of these treatments up until the time you left on your vacation; is that correct?

[fol. 359] A. Yes.

Q. While you have that in your hand, you said something about a code, Dick Murphy. That has ten letters in it. Is that correct?

A. That's right. The D stands for 1, and the I stands for 2, and the C for 3 and so on.

Q. Does that card show a code after each visit?

A. It certainly does. After each and every visit, in my own handwriting.

Q. That is where?

A. "DY" on August 3, 1955. All code marks were put in by the doctor after examining the patient. All these made by the doctor.

Q. Then the patient would take that to the young lady in the outer office and pay her?

A. Or charge.

Q. And she would run it on the book?

A. That is correct.

Q. Have you endeavored to find out who may have examined or treated Fidele Garcia prior to the time he came to see you?

A. Yes. He was examined by Dr. Vogt and Roy.

Q. Do you know if either of those two doctors are alive?

A. They are both dead. I had hoped to have them and testify with Fidele Garcia, but I found out both of them [fol. 360] had died within the last two years.

Q. Do you have in your possession a written report of Dr. Vogt as to his findings on Fidele Garcia after this automobile accident?

A. I certainly do.

Q. And to whom was that report made?

A. This report was made to Crawford & Company, adjusters for an insurance company, at Biscayne Boulevard, Miami, Florida.

Mr. Roberts: This lengthy report I will read, but to save time—

Mr. Cline: Objection, your Honor. Strictly hearsay.

The Court: Sustained.

By Mr. Roberts:

Q. Where did you get this?

A. I received this letter from the attorney who settled the case for Garcia and he informed me Garcia had received fifteen hundred dollars in settlement for his injuries, in addition to all of his medical bills being paid.

Q. Did you know, or do you know what branch of medicine Dr. Vogt specialized in?

A. Dr. Vogt was an orthopedic specialist just as Dr. Abrashkin is.

Q. A bone specialist?

[fol. 361] A. Bone and joint specialist.

Mr. Roberts: We offer in evidence the letter identified by the witness as the report of Dr. Vogt on Fidele Garcia's condition.

Mr. Cline: Objection, your Honor.

The Court: Objection sustained.

By Mr. Roberts:

Q. I hand you now what has been marked for identification as Defendant's Exhibit 9 and ask you to tell me what that is.

A. This is a card on Gerald Miller residing at 1318 Euclid Avenue, age twenty-seven, dated July 29, 1955.

Q. Is that your medical history of Gerald Miller?

A. That is my medical history.

Q. And a part of your record. Is that correct?

A. That is correct, the same as all the other records in this case.

Mr. Roberts: We offer it in evidence.

Mr. Cline: No objection.

The Court: It will be admitted.

[fol. 362] (Thereupon the exhibit was marked in evidence as Defendant Needelman's Exhibit 9.)

Q. Will you tell us what his complaint was and what was your course of treatment?

A. Mr. Miller came in with an infected running cyst on his right ear lobe and requested that perhaps I remove this thing for him on his visit, which I did. I removed the cyst and put in two sutures and gave him Penicillin so there would be no future infection, and he gave me a history of having rheumatoid arthritis of the spine.

Q. What is that?

A. An inflammation condition of the spine which is associated with pain inflammation anywhere in the body—sometimes it will settle in a joint and give a patient pain for the rest of his life, particularly with weather changes. He can tell you when it is going to change, because of the pain in the joints. Such was the condition of this young man, Gerald Miller whom we examined. On examination of this patient, Gerald Miller, we had him disrobe and examined his spine and again we found tenderness and spasm of the muscles along the spine all the way up and down his spine. The entire spine seemed to be involved, and he told me at that time he had been going to a doctor in the southwest section of Miami and he had left and the [fol. 363] doctor had given him many injections of Aquadiol and given him many prescriptions for Cortisone and that this had never relieved him, and he, himself, told me that the only thing that the doctor would prescribe for him to be of any use would be Methadon tablets, also he had been given prescriptions for Codeine and for Methadon. He told me he had not taken anything like that, but Methadon tablets would stop his pain, and would I agree to take over, since he had just moved to 1318 Euclid Avenue. I told him I was going on vacation, but I was leaving another doctor in the office who would be glad to follow along with this case and treat him accordingly, and I introduced him to Dr. Szekely and Dr. Szekely said he would be de-

lighted to go ahead and treat this patient. The patient came in on July 29th and we removed the thing from his ear with surgery and after determining he was having pain, prescribed Methadon tablets, and to return three days later on August 2nd at which time we changed the dressing on his ear. He said he had used the Methadon tablets and had taken as many as eight a day and we suggested, to see if it would ease him, suggested Aquadiol, and he said he didn't think it would help, but we gave it to him.

On August 5th we removed the sutures from his ear and the ear was festering and we gave him some penicillin and gave him another prescription for Methadon. That was August 4th we changed the dressing. On August 3rd we [fol. 364] removed the sutures. He came in on August 4th and 5th when the wound was healing, and this was the last time I saw him before leaving, and we gave him another injection of Aquadiol, and we asked him about who the doctor was who was treating him, and he said, well, he couldn't recall offhand, but he was a doctor in the southwest section, and he couldn't think of the name. I said that if he did we can get a letter from the other doctor as to what he found and get a report of the X-ray findings or anything else he might have, and with that I left, and that was the last time I saw Gerald Miller.

Q. Did he continue to go to your office during your absence?

A. He did.

Q. What does your record indicate as to the visits that he made to your office during your absence, and what was done for him?

A. The records indicate to me that he was seen and given diathermy each time and given a prescription for Methadon each time he came in.

Q. How long does it take for a diathermy treatment?

A. Twenty minutes.

Q. That is putting them under a lamp, in layman's language more or less?

A. That's right.

Q. The office assistant can do that?

[fol. 365] A. Yes, she can do that. I would assume,

though, that the doctor saw the patient each time before he sent him back for his diathermy.

Q. That card likewise has the initials, "DY" as to the fee that was charged?

A. That is correct.

Q. I hand you what has been filed for identification as Defendant's Exhibit 6, and ask you to tell me what that is.

A. This is the office record of Alice Buononito who we saw for the first time on July 16, 1955. Her complaint at that time was severe pain in the right lower quadrant. Examination showed a temperature of 100.6, 96 pulse; respiration, 26 and urine that was passed was loaded with pus cells.

Q. This is one of your medical records which you kept in your office?

A. Yes.

Mr. Roberts: We offer this in evidence.

Mr. Cline: No objection.

The Court: It will be admitted.

(Thereupon, the Exhibit was marked in evidence as Defendant Needelman's Exhibit 6.)

[fol. 366] By Mr. Roberts:

Q. Now you may testify from that as you did with the others and tell what was done in your office for Alice Buononito and what condition she was in.

A. At this time we examined her, her temperature was 100.6 and she had a pelvic examination and we found that the right tube of the ovary was markedly swollen, inflamed and extremely tender to the touch. Further, we determined that adhesions within the abdominal wall and movement inside would elicit severe spasm in the abdominal muscles. She was given Penicillin, 601,000 units, and told to douche with hot vinegar douches, and was offered Codeine tablets for relief of pain, which she stated did not agree with her. So I therefore suggested that perhaps Methadon would relieve her pain, and prescribed Methadon for this lady. That was July 16th. She returned ten days later and she still had a lot of pain, and we gave her more Penicillin and

suggested again hot douches and tried some diathermy on her right lower quadrant. That was the 16th and on the 26th, and then she came in the following day, still complaining of pain, at which time we gave her more Penicillin and diathermy and she returned three days later, at which time I suggested perhaps she might have some surgery and have the tube of the ovary removed, since it looked to me like this thing would go on indefinitely. She refused surgery and stated she couldn't take time out. She had a [fol. 367] young baby and financially she wasn't in too good a shape at this time to put herself into the hospital for surgery.

So she returned again three days later on August 2nd and at this time, besides Penicillin, we again tried to give her Aquadiol, this Cortisone-like drug which we hoped would reduce the inflammation within her pelvis, and perhaps make her more comfortable.

Q. This is the same lady that Dr. Newman testified about today. Is that correct?

A. Yes. On August 5th she returned and the pain didn't seem to respond to Aquadiol and Penicillin, and I called Dr. Pena, who has been my character witness. He, as you heard, delivered both my babies and Mr. Roberts' and a few thousand other babies in Greater Miami. He was head of the Gynecology of Jackson Memorial and Mercy Hospitals. I asked him for his suggestions as to what I could do for this girl, on the telephone, and he said if these things didn't work to try some Jacobson's Solution, which is injectable, and used in chronic inflammatory diseases. I went out at that time to get a preparation of Jacobson's Solution to give an injection test, and showed this to Dr. Szekely who was going to treat her during my absence, and she was getting these things, and if he wanted to, he could continue to treat her. He would be the doctor in the office, and I left at that time and Dr. Szekely was familiar with [fol. 368] this patient also at the time I left.

Q. He likewise has to get a fee on these visits?

A. Correct.

Q. By the way, Doctor, do you know where Gerald Miller is at the present time?

A. Yes, I do.

Q. Where is he?

A. He is in New York at the present time.

Q. Have you tried to locate some doctor who treated him either before or after he was your patient in your office?

A. I have tried very hard, indeed, to locate the doctor who treated him before and after he was in my office.

Q. What have you done in order to try and locate him?

A. I have searched almost every drugstore in Greater Miami for prescriptions for Gerald Miller, hoping to find the doctor who treated him, so that I could at this time substantiate or prove that the patient had a condition which I found he had and which he stated he had, and I could find no prescription in Greater Miami for Gerald Miller.

Q. So, therefore, you could find no doctor?

A. I could find no doctor.

Q. To get a lead on Gerald Miller?

A. No.

[fol. 369] Q. There has been some testimony in here about Abe Bruches leaving some money at the drugstore for you. Will you clarify that, please?

A. I think it was testified to the jury that any moneys left were in payment of an old bill accumulated for the last two years. I asked him to make every effort to pay the thing, and he said to me, "Well, every time I go into your office and there is a lot of people there, they keep me waiting an hour [illegible] they will take my business." And he said, "I have to run to the barbershop and run back again, and I cannot go in there and wait. When you are there you understand my position and you take me in right away and treat me and get me out, but I cannot go into that place, because a similar thing happened the year before." That I had been on vacation the year before and he had been kept waiting for an hour, and this was disastrous, and I suggested perhaps he could make a little effort to pay the bill by leaving some money at the drugstore and they would keep a little separate file of whatever he paid and in return, I would ask Dr. Szekely, which I did, to do me a favor, since this man was not too well off financially, to treat him without charge while I was away. He came in fifteen times during the period and was given injections

of Penicillin and B-12 and properly examined by Dr. Szekely each time without charge.

[fol. 370] Q. And the money that he left at the Medical Arts Pharmacy was strictly in payment of a prior obligation?

A. Strictly in payment of a bill, nothing else. Mr. Rudd could have determined that by speaking to the Bruches before he caused this whole situation.

Q. Do you consider any of those patients narcotic addicts?

A. I certainly do not. And certainly never told Mr. Rudd that they were addicts, and he knows it.

Q. Would you give us your version of what transpired that day in your office when Mr. Rudd came in there?

A. First let me say that I had no idea in the world that Mr. Rudd was investigating me at all in any possible narcotic violation. Mr. Rudd came in and identified himself as he said, and said "There has been some irregularities while I was away," and he was checking into some of these prescriptions and the impression that Mr. Rudd gave me is that someone had been forging my name to prescriptions or perhaps my nurses had been doing something about prescriptions that I didn't know about. I was most anxious to help Mr. Rudd in every way, and I said, "I don't know what this is all about, but I will be happy to help you in any way. I can clarify anything you are looking into." He said, "Bring out your day book." First Mr. Rudd said to me, "Do you have any prescriptions left of the patients who were here during the summertime?" I said, "You mean unused prescriptions?" And he said, "Yes." You may [fol. 371] recall, on the unfilled prescriptions, he had just come from the drugstore where he had heard there were unused prescriptions, and he asked me for them. I said, "I have some which were not filled which I have in the drawer, of Mr. Garcia and the Bruches, which were returned from the drugstore." He said, "Could I see them," and I said, "Surely". Then he said to me, "Well, now, are these patients addicts?" and I said, "Certainly not." He said, "Well, if they are not addicts, how do you know?" I said, "Mr. Rudd, I have a complete history, the complete histories of every patient I ever treated here. Let me get my medical cards and show you the letters from the doc-

tors and letters from hospitals on these patients, and you convince yourself." He said, "Get the records." I got the records. He denied seeing the records at this trial, but he saw the records at the last trial. I brought out the records and showed them. He took a quick glance and said, "Let me see your day book." He said, "We would like to determine the number of prescriptions issued." He said, "What does this $20.00 mean?" I said, "That means that this person, Fidele Garcia, paid $20.00 and got two prescriptions." He said, "Two prescriptions?" I said, "Yes". I spoke to Dr. Szekely on the telephone—that was Wednesday—and he told me he had written prescriptions more than one prescription to a patient, and I told Dr. Szekely it was not right. He could be hung for a thing like that. And I explained to Mr. Rudd that the twenty dollars for [fol. 372] the two prescriptions had been explained to me by Dr. Szekely the day before. So then Mr. Rudd said to me, "Well, now, do these people have an incurable disease?" I said, "They have incurable diseases and have chronic diseases." I said, "You can see from the records." We would give these drugs to relieve pain or to make them comfortable. I said, "They have pain. They are not addicts. They have pain." He said, "If you give these people something to relieve their pain, don't you make them comfortable?" I said, "I suppose if you relieve the pain you make them comfortable." He said, "Let me read you something." And he pulled a book out and he reads from the book, it is illegal to prescribe medication for the relief of craving of an addict or to give a patient comfort. I said, "Mr. Rudd, you said it was for comfort. I said it was for pain." Mr. Waters says he doesn't remember any discussion about pain or comfort. Mr. Waters said what he read in Mr. Rudd's prepared notes which were recently prepared, and his written notes, but he failed to bring in that which we would like to see; and he doesn't try to bring it in here.

Mr. Cline: I move to strike every word of that alleged testimony.

The Court: The motion will be granted as respects to the arguments part.

[fol. 373] By Mr. Roberts:

Q. Did you at any time issue the prescriptions to any of these patients solely for the purpose of satisfying their craving for narcoti drugs?

A. Never.

Q. On every occasion when you issued the prescriptions for these patients, was it always, to alleviate pain and suffering that they had at that time?

A. Always.

Q. Were you satisfied in your own mind and in your heart that you issued prescriptions for these patients—when you issued these prescriptions for these patients, that that was the proper thing for a physician to do under the circumstances?

A. Absolutely.

Mr. Roberts: That's all.

(Thereupon, the hearing was adjourned until 1:45 P.M. of the same day, at which time, the following proceedings were had.)

Cross examination.

By Mr. Cline:

Q. Doctor, how long have you known Mr. Kipnis who testified on your behalf this morning?

A. About seven years.

Q. I understood from you or him one to say seventeen [fol. 374] years, or something to that effect?

A. That was Dr. Pena.

Q. I understood it was Mr. Kipnis?

A. No.

Q. Where is Middlesex University?

A. It no longer exists.

Q. Where was it?

A. Massachusetts, in 1938.

Q. I think you said you were in the Army three years and nine months?

A. Yes.

Q. Was that a voluntary enlistment or were you drafted?

A. It was a voluntary enlistment.

Q. When did you go in?

A. I went in on August 26, 1942.

Q. No one asked you to? You just volunteered?

A. No one asked me to; I volunteered. May I say that I volunteered much earlier to go into the Navy. As a matter of fact, on December 7th when war broke out, which was a Sunday, on December 8th I applied for a Commission in the Navy and was examined by a Navy Medical Doctor who at that time told me my application would be considered, and a short time after that it was denied because they said I was five feet, four inches, and I was too short to be an officer in the Navy, because at that time a Naval Officer had to be five feet, six inches tall. That was [fol. 375] the standing regulation, and I still have the letter from the Navy.

Q. Now, I believe you went on your vacation in 1955 about the 6th of August; is that correct?

A. 6th of August.

Q. And at that time you left both Dr. Grier and Dr. Szekely in your office?

A. That is correct.

Q. Now, how long had you been treating Fidele Garcia?

A. As I have testified before, since 1943.

Q. Since 1943.

A. That is correct. I beg your pardon. 1953.

Q. How about Alice Buononito?

A. Again, that is on my card.

Q. Just as best as you recall.

A. May I refer to my records of Alice Buononito and I will tell you that.

Q. Now, as to Alice Buononito, your Exhibit 6 would indicate that you started treating her just a matter of about two weeks before you went on vacation.

A. No. As a matter of fact, I treated her in 1952.

Q. I am calling attention to the card. What is the first date on this card?

A. July 16 1955. That is twenty-one days before I went on vacation.

[fol. 376] Q. Thank you very much. That is three weeks instead of two. How about Fidele Garcia? The first date on this card says December, 1953. That would be right; is that correct?

A. Correct.

Q. And Gerald Miller?

A. July 29th. Just about nine days before I went on vacation.

Q. How long do you feel it takes you in treating a patient to become very familiar with their illnesses and the type of treatment that they require?

A. I think I can pretty quickly at the first visit determine fairly well what is going on with a patient, his physical condition.

Q. In your course of practice over a period of years, have you come in contact with many narcotic addicts?

A. I have come in contact with one narcotic addict by the name of John Klingo and I called the Narcotics Bureau and informed them of this patient and that was in 1952.

Q. That is the only narcotic addict you ever came in contact with?

A. That I treated as an addict and reported to the Narcotic Bureau.

Q. Do you know where Gerald Miller is today?

A. I did. I don't know where he is today. I knew where he was about two weeks ago.

Q. Do you know, or did you know, that he was arrested at Miami Beach a few years before you treated him, for peddling marijuana?

A. I knew nothing of any patient being arrested or being in any narcotics hospital at the time I treated them.

Q. Do you know where Fidele Garcia is?

A. I do.

Q. Where is he?

A. He is working for the Rainbow Press today, 29th Street and Miami Avenue.

Q. Do you know how long he has been in a Federal penitentiary for narcotic violations?

A. I have no idea, and I had no idea of anything at the time I treated him, either.

Q. If I told you that he was convicted here on the same spot three months after you treated him, would it surprise you?

A. If I told you a man came to me with a broken leg and was a narcotic addict, would you expect me not to treat him for his pain?

Mr. Cline: No, sir, not in any way, shape or form.

By Mr. Cline:

Q. I believe you testified that at the time you left on your vacation Dr. Szekely was not admitted to practice here in Florida; is that right?

A. That is correct.

Q. He became admitted while you were gone?

[fol. 378] A. That is correct.

Q. And any and all narcotics prescriptions that were issued through your office during the period August 6th to September 22nd would have been issued under his direction. Is that correct? Or Dr. Grier's?

A. Were to be issued by himself after examining the patient and deciding that in his opinion they needed the prescription.

Q. Dr. Szekely or Dr. Grier, is that correct?

A. As far as Dr. Grier, no. He was just to stay there in a supervisory capacity because he had a license to practice. Dr. Szekely was the man who had spent the week before and had become acquainted with the patients, and he was to treat the patients under Dr. Grier's supervision.

Q. Dr. Grier was not to have charge of issuing any of these so-called prescriptions?

A. He was to issue his own prescriptions at such time as Dr. Szekely did not have his license to practice, or had failed to pass the examination.

Q. I assume you have been through this group of so-called prescriptions pretty much in detail.

A. I think they are real prescriptions.

Q. Would these have been issued in the same number and with the same frequency had you been in town instead of in Europe?

A. If I were there and examined a patient at that time and found they had the pathology they had I would have [fol. 379] probably issued the same number, or perhaps less. I don't know. I wasn't there.

Q. The frequency with which they were issued during the period you were gone depended on their examination; is that right?

A. The frequency with which some of these prescriptions were issued were a lot more than the prescriptions I had issued during the time I had seen the patients.

Q. Do you know how many prescriptions you issued to Fidele Garcia?

A. Approximately forty which was to cover a ten week period maximum.

Q. Do you recall how many you issued between the 1st and the 6th of August, in this list, in this group of one hundred thirty-eight?

A. I think if you will refer to the day book you will get an idea of what was issued to Fidele Garcia during the week before I left.

Q. Suppose you do that for me.

A. You might look through the entire year.

Q. Let us start with the 1st of August and go to the 6th of August and see what your books indicate for the period of 1st of August through the 6th of August, 1955.

A. Fidele Garcia, August 1st. That would be one. Fidele Garcia, August 2nd; Fidele Garcia, August 3rd.

Q. He came every day, didn't he?

[fol. 380] A. I don't know yet. We will see. Fidele Garcia, August 4th; Fidele Garcia, August 5th. That is all that I issued. I did not issue any on the 6th. On the 6th he was issued two prescriptions by Dr. Szekely.

Mr. Cline: Please mark this for identification.

(Thereupon the instrument was marked for identification as Government's Exhibit 143.)

By Mr. Cline:

Q. I show you Government's Exhibit 143 for identification and ask you if these documents bear your signature?

A. I see prescriptions here, August 3rd, August 4th, August 5th, two on the 5th, the 6th I didn't issue. The 1st and 2nd you don't have here, that was issued. I see two prescriptions on the 5th.

Q. Do these bear your signature?

A. Yes, they do.

Q. Tell us whether they appear to have been filled, Doctor?

A. Let's look closer at this thing.

Mr. Cline: Take all the time you want.

The Witness: One was filled on August 5th and one was filled on August 7th, Medical Arts Drugstore.

[fol. 381] Q. How about the other one. What dates were those filled?

A. August 3rd and 4th. I am not giving the 6th. That I didn't issue. There is something very irregular here. Never issued this man two prescriptions at any time in my entire practice.

Q. Is that your signature?

A. Yes, but there is something wrong here, but we will find out pretty soon just what it is.

Mr. Cline: Fine, fine.

The Witness: The stamped signature on August 6th looks very peculiar. Are we quite sure this is—it says August 5th.

Q. I don't know. You tell me.

A. Well, we have seen a single entry of ten dollars on August 5th for Fidele Garcia, so that the patient was charged ten dollars for a visit.

Q. Well, the fact that he was charged ten dollars for a visit doesn't mean he would have been given two prescriptions does it?

A. He would not have been given two prescriptions by me, at least not consciously.

Q. Well, I will ask you this: Does the fee that a person pays a doctor necessarily determine the number of prescriptions that the doctor gives?

[fol. 382] A. Not at all. Not at all. But I am trying to still look at this thing and try to figure out just how this came about.

Q. All right. Whenever you have an answer, you come up with it.

A. I don't think the druggist would falsify anything here.

Q. If I told you that these prescriptions were picked up at the same time as these other one hundred thirty-eight, would you have any reason to doubt that?

A. No, I don't doubt that. I will tell you, I think I can explain this thing.

Q. All right. Go ahead.

A. It is possible, I don't say it happened, but I think it is possible.

Q. Are you going to testify to facts?

A. I am going to tell you what I think. I am going to try to explain these things and see if it isn't possible. I remember about two weeks ago a patient coming to my office who I examined very thoroughly for a cold.

Q. We are interested in August and September, 1955.

A. We will get back to this. At that time, after examining this little lady, I wrote her a prescription for some cough syrup and sent her back into the treatment room to receive an injection of Penicillin, and after she received her treatment she came back to me and I started to write her a second prescription for cough syrup, and at that time [fol. 383] she said to me, "Why Doctor, you have already given me a prescription," and I tore it up. There is a possibility here that I might have written one prescription and Fidele Garcia went back and got his treatment and got his diathermy and after twenty-five minutes returned to me and I unconsciously wrote a second prescription for him, not realizing I had written him one prescription, and he evidently picked up the second prescription and walked out.

Q. Being an addict, he probably did that, didn't he?

A. I didn't say he is an addict, but I just did not issue two prescriptions to him at any time. You can take this book and go to the drugstore in Greater Miami and see it is so.

Q. I don't see—I don't think your cash book is going to tell us how many prescriptions you issued, is it?

A. No. But you can check the cash book against every prescription in Greater Miami and see there are no prescriptions issued for more than what is in this cash book.

Q. Do you know how many prescriptions of these one hundred and thirty-eight were issued to Garcia?

A. I imagine in the vicinity of forty. I don't know. You can count them.

Q. So that actually the frequency here is no greater than the frequency before you left the office; is that right?

A. The frequency there would be less than when I left the office, less than one a day.

[fol. 384] Q. But before you left it was one a day; is that correct?

A. It was only one a day the last week.

Q. It was one a day while you were in the office.

A. No, sir, it was one a day the last week, not while I was in the office. You have heard me testify that Fidele Garcia came in sometimes a month apart.

Q. How about Gerald Miller? How often did you furnish prescriptions to him for narcotics?

A. I don't remember, because he was one of the recent patients that came in about seven to nine days before I went on my vacation. That is one man I never had a chance to check further into and get a list of the doctors he was supposed to have gone to and what his condition was. He was the only person I have no other letter on.

Q. You say you have other letters on Garcia?

A. Yes, sir.

Q. About his addictability?

A. No, sir, not addictability; about his physical condition.

Mr. Cline: Please mark these of identification.

(Thereupon the instruments were marked for identification as Government's Exhibit 144.)

Q. I hand you Government's Exhibit 144 for identification, and ask you do your signatures appear on these?

[fol. 385] A. They do, but again on Gerald Miller I see August 6th and that probably was not issued by myself.

Q. Does it say what date it was filled?

A. August 4th and August 5th are what I issued.

Q. So two out of the three would have been issued by you?

A. Yes.

Q. The two days immediately before you left?

A. Yes.

Q. If Gerald Miller got one a day while you were gone that would be the same as he got while you were in town?

A. No, sir, he did not get one a day while I was away or before.

Q. You issued one to him on the 4th and one on the 5th.

A. He might have had excruciating pain at that time. I had just removed a cyst from his ear. He had pain in his ear and joints, as I explained to the jury, which affected him and which probably flared up his arthritis more than previously.

Q. How about Alice Buononito? What did you know about her?

A. My examination I have testified to. She was a woman with inflammatory disease and had infected tubes in her abdomen. Every time the intestinal bowel would move she would have pain. Dr. Newman testified to that also.

Q. You had been treating her three weeks before you went away?

A. She was not completely new to me. In 1952 I had [fol. 386] treated her under the name of Alice Bennett, at which time she was pregnant and she had to have her baby adopted.

Q. Do you know what Abe Bruches' profession was?

A. I had no idea. I didn't ask my patients their profession, as a rule.

Q. I show you Government's Exhibit 145 for identification and ask you if your signature appears on these documents?

A. They appear on August 5th and they appear on August 6th. I am not an attorney, but isn't this case about prescriptions which were issued on August 6th and September 22nd?

Mr. Cline: No, sir, not any more. I show you Government's Exhibit 146 for identification and ask you if your signature appears on these documents, and if they do, what dates?

A. Does this case include Abe Bruches at this time?

Mr. Cline: The Judge will rule on the law. You answer the question.

A. These are prescriptions of Abe Bruches.

Q. What are the dates, Doctor?

A. This is August 3rd, August 4th, August 5th and August 6th, on which day I probably did not see him.

Q. All right. Pull the 6th out of that group and tell me how many there are between the 1st and the 5th of August.

A. The question here as to prescriptions on August 4th. I had issued Abe Bruches forty-eight tablets at that time. [fol. 387] It has been testified that this patient received six prescriptions a week for the last seven years. He received two prescriptions for Codeine when he came into the office in addition to his regular treatment.

Q. So that what Abe Bruches got down there at Mr. Waxman's drugstore wasn't any different than what he had been getting through your office in the ordinary course of business. Is that right?

A. He received a prescription which he had been getting—these memo prescriptions—since November, 1954.

Q. Do you know when these prescriptions were made up?

A. November of 1954.

Q. Are you sure it wasn't February, 1955?

A. No, sir.

Q. If I told you I saw an invoice yesterday from Mr. Rouse of the printing company dated February, 1955, that wouldn't refresh your memory at all?

A. I am quite sure it was November, 1954. That would be three months later, which would be six months before I left. That may be so.

Mr. Cline: Please mark this for identification as Government's Exhibit 147.

(Thereupon the instruments were marked accordingly.)

[fol. 388] Q. How about Government's Exhibit 147 for identification? Do these alleged prescriptions bear your signature?

A. Yes; August 2nd, 4th and 5th. They do bear my signature.

Q. What are the dates?

A. August 2nd, 4th and 5th.

Q. So that apparently this person was getting just as much before you went away as he got after you were gone. Is that correct?

A. No, sir.

Q. What does it indicate?

A. This indicates; if you will look at the record which is in evidence, that Harvey Sachs was suffering a week or two before I left with an obstructed prostate gland. We are still treating that as well as the osteo-arthritis. He was given Methadon to stop his pain, and while he was in, he received one prescription a week for a period of seven weeks.

Q. How about Government's Exhibit 148 for identification?

A. August 1st and 2nd, twice, August 3rd, August 5th and the 6th. I didn't issue.

Q. So there is two in one day in that group?

A. Yes, for Lottie Bruches; but in her particular case she was receiving half the amount of Codeine, as a rule, that Mr. Bruches got, and also she came in less frequently than he did, and they were getting forty-eight tablets at a time when they came in, both Abe and Lottie Bruches. [fol. 389] Lottie came in less frequently than Abe.

Q. Were their illnesses exactly the same, Doctor?

A. No. Lottie had tri-facial neuralgia and pansinusitis, and we have records to prove that.

Q. Did they require exactly the same treatment?

A. Almost the same, because Abe Bruches was receiving penicillin inhalations for his illness, and Lottie Bruches was receiving penicillin inhalations for her sinus.

Q. So you used the Methadon prescription but you did write Abe on one and Lottie on one?

A. Not Abe Bruches. There was no name written on that prescription at any time.

Q. The prescriptions were for twenty-four one-grain Codeine tablets; is that correct?

A. Yes. I had that prepared that way because my own prescription for a non-addictable narcotic was twenty-four tablets at a time.

Q. Your testimony is that Codeine is non-addictable?

A. My testimony is that Codeine orally is not addictable.

I have read that in numerous text books by Walter Abbingley (?). He will tell you that Codeine taken orally is not addictable.

Q. Do you know Bernice Sachs?

A. Not personally.

Q. Do you recall her testimony at the first trial when she [fol. 390] said she was directed to receive two dollars and fifty cents for each prescription issued?

A. She was directed to receive that by no one at any time.

Q. You heard her testimony to that, didn't you?

A. That was not her testimony.

Q. You are sure of that?

A. I am quite sure. She would have no reason to say such a thing.

The Court: We are not going into the first trial testimony. Let's stay right here with this trial. She testified in this trial, didn't she?

Mr. Roberts: Yes, sir.

By Mr. Cline:

Q. When did you first get to know Mr. Rudd?

A. I have never got to know him. I still don't know him.

Q. When did you first have your conversation with Mr. Rudd?

A. My first conversation with Mr. Rudd was in 1952.

Q. Regarding what?

A. With regard to something we had a dispute about.

Mr. Roberts: I object to going back to that.

The Court: I will declare a mistrial if you don't keep within this record. We don't want to try this case over again.

[fol. 391] By Mr. Cline:

Q. How long have you known Mr. Waxman?

A. I have known Mr. Waxman since I opened my office. That would be nine and a half years.

Q. What sort of conversation did you have with Mr. Waxman when you took the Bruches' prescriptions?

A. I am glad you asked that little question, because it was testified by everyone that when we took the Bruches' prescriptions in the drugstore on August 6th that Mr. Waxman was not there, even though Mr. Rudd said he was not there. Mr. Waxman was not there on August 6th when I brought the Bruches' prescriptions to the drugstore, and I left them with Mr. Kamisarow and that was testified by Mr. Kamisarow, Bernice Sachs, and everyone else in this case except Mr. Rudd.

Q. What conversation did you have with Mr. Waxman regarding the prescriptions that you left at his drugstore?

A. None whatsoever.

Q. None at all?

A. None at all.

Q. You didn't direct him to collect two dollars and fifty cents?

A. Ridiculous.

Q. Then it is a coincidence that the number of prescriptions multiplied by two dollars and fifty cents comes to within two dollars and fifty cents of one hundred seventy-two dollars, fifty cents?

[fol. 392] A. Why didn't it come out exactly?

Q. Who set the fees in your office while you were gone?

A. Dr. Szekely set the fees, as I had set the fees, and was instructed to set the fees.

Q. You didn't instruct your two young ladies in your office what fees to collect for these prescriptions?

A. At no time.

Q. At no time?

A. At no time.

Q. You heard the two of them state that it was five or ten dollars. Are they both liars?

A. They were both named in the conspiracy.

Q. Are they both liars?

A. I am not allowed—they are not lying. They are both cooperating with Mr. Rudd.

Q. Do you think Mr. Rudd asked them to lie on that stand?

A. Well, Mr. Rudd said in the last trial that no prescriptions were picked up, that everything that was there in

the last trial were from the Medical Arts Pharmacy when he knew darn well twenty-three were picked up in one place, and—

Q. I asked you if you thought that Mr. Rudd asked them to lie in this stand?

A. I think there was some little conspiracy between he and the nurses and possibly Dr. Szekely, too.

Mr. Cline: Your witness.

[fol. 3951] Mr. Roberts: I have no further questions. The defense rests.

Mr. Cline: The Government will rest.

The Court: The jury will be excused while we discuss some legal problems.

(Thereupon the jury retired from the courtroom at which time the following proceedings were had.)

MOTION FOR JUDGMENT OF ACQUITTAL AND DENIAL THEREOF

Mr. Roberts: I have a motion, if your Honor please.

Comes now the defendant at the conclusion of all of the testimony offered in the case and moves the Court to enter a judgment of acquittal herein and for grounds therefor respectfully shows to the Court that the Government has failed to prove the material allegations contained in each and every count in the indictment upon which the defendant is being tried; and on the further ground that there has been no showing whatsoever that either Gerald Miller, Alice Buonomito or Fidele Garcia were in any need of the medicine Methadon prescribed for them on the occasions set forth in the indictment. On the further ground that there has been no showing that at the time the said patients [fol. 3952] received the prescriptions that they were narcotic addicts. On the further ground that there is no showing that at the said time the patients received the prescriptions that the same were given to them to satisfy their narcotic craving or appetite.

The Court: I will deny the motion and let the motion and let the matter go to the jury. I think this is a very

slender case, offhand, but I think there is enough to go to the jury.

(Thereupon, the conference on instructions was had, after which the jury returned to the courtroom and counsel argued to the jury; after which the Court charged the jury as follows:)

. . . . . .

EXCERPT FROM NARCOTIC CASE REPORT—October 31, 1955

Testimony of Witnesses:

[fol. 415A] K. C. RUDD, Narcotic Agent, will testify that on Sept. 21, 1955, he, assisted by Narcotic Agent E. S. Waters and Florida State Narcotic Inspector, R. R. Bellinger, began an active investigation of the narcotic activities of Dr. Harry Needelman and drug store operator Walter Waxman, the defendants in this case.

That on September 22, 1955, accompanied by officers Waters and Bellinger he did, in the course of an official visit to the Medical Arts Pharmacy, 1500 Washington Avenue, Miami Beach, find Exhibits 5, 6, 7, 8, 9, 10, 11, and 12 in the narcotic prescription file of that drug store; which file was handed to him by pharmacist David Komisarow, who was the pharmacist on duty and in charge at that time at that store.

That each of the 43 purported prescriptions making up Exhibit #5 and each of the 26 prescriptions making up Exhibit #6, each calling for 24 1 gr. Codeine tablets, are a product of 'offset' printing including the signature 'Harry Needelman' and printed up on blanks of Dr. Needelman's. That all of the prescriptions bear one date of August 6, 1955, and that all the prescriptions bear the written-in notation 'To be filled'; immediately following each such notation is the date on which the narcotics were dispensed and the prescriptions filed. That all the writing on all the prescriptions, including the names of the alleged patients, the narcotic and amounts, and the signature of Exhibits 7, 8, 9, 10, 11, 12c, d, e, f, and g, are in the handwriting of and were written out (less dates) by defendant Needelman. That

practically all those Exhibits, the same as in the case regard Exhibits 5 and 6, bear the date August 6, 1955, and other date when filled and filed.

That upon finding the above Exhibits, they were removed and seized from the Medical Arts Pharmacy by him (Rudd) who, together with the other officers, initialed those Exhibits for future identification.

That on the same date, September 22, 1955, after finding and seizing the above described prescriptions and previously having found and seized the four prescriptions making up Exhibit 16 on September 21, 1955, he (Rudd), accompanied by officers Waters and Bellinger, proceeded to the office of Dr. Harry Needelman at Miami Beach, were he (Rudd) exhibited his official credentials to Dr. Needelman, introduced officers Waters and Bellinger, and told Dr. Needelman that he was making an official inspection investigation of Dr. Needelman's narcotic activities in con-[fol. 415B] nection with his (Needelman's) being registered under the narcotic laws as a physician-dealer in narcotics.

That he (Rudd) further stated to Dr. Needelman that in the course of said inspection and investigation, he was going to ask the doctor certain specific questions in regard his narcotic activities and particularly in regard the persons Abe Bruches, Lottie Bruches, Fidel Garcia, Gerald Miller, Harvey Sachs, and Alice Donaiuto, Dr. Needelman being asked by Rudd if he had any objection to the inspection and investigation and if he (Needelman) had any objection or was unwilling to answer any questions put to him in regard the above persons, to which Dr. Needelman answered 'Why no, of course not, I have no objection, why should I'.

That he (Rudd) then laid out in front of Needelman Exhibits 5, 6, 7, 8, 9, 10, 11, 12, and 16, Rudd then saying to Dr. Needelman that it was in regard the persons named in those prescriptions and the prescriptions themselves that he wished to ask Dr. Needelman about.

That at that point Dr. Needelman voluntarily and spontaneously stated that he had left those prescriptions with 'those addicts' when he left for Europe. That they were

all addicts and had used opium, heroin, morphine and dilaudid, that he gave it to them to keep them comfortable, and so that they could keep going and stay on their jobs and so that they would not go out on the streets looking for heroin or dilaudid. That he (Needelman) gave the Bruches codeine because they had been addicted to that drug for some time, and that they were suffering from asthma. That he gave the others Methadon because it would hold them comfortable and was the least addicting of narcotic drugs. That he (Needelman) further voluntarily stated that he thought it was wonderful that 'those addicts' (Needelman's expression) were only taking Methadon and not using any heroin or dilaudid at exorbitant prices.

That Rudd then asked Dr. Needelman if he had ever discussed with 'those addicts' the possibility of them going to a U.S.P.H. Hospital at Lexington for cures of their addiction and Dr. Needelman replied that they couldn't or wouldn't go, that they worked for a living but that they had talked about it.

As to the Bruches' prescriptions Dr. Needelman answered that, upon departing from his office and practice for several weeks in Europe, he left all of the Bruches' prescriptions of this case (less any dates noted on them) with Walter Waxman, druggist-operator of the Medical Arts Pharmacy. That the Bruches' prescriptions were to be filled in that store when either of the Bruches appeared there during his absence. That it was his suggestion to Waxman that the two dates be entered onto the prescriptions.

[fol. 415(')] That it was his instructions and request to Waxman that a $5.00 fee be collected for him (Needelman) by the druggists each time one or both of the Bruches obtained the narcotics as called for in the Bruches' prescriptions, identified herein as Exhibits 5, 6, and 13a.

That on that very day of September 22nd, and just a short while previous to Rudd's visit to his office Needelman had gone to the Medical Arts Pharmacy and there collected $175.00 cash plus all unused Bruches prescriptions (Exhibits 13a and b).

That Dr. Needelman did then, without protest, at request of Agent Rudd, surrendered Exhibits 13a and b,

which are identical to Exhibits 5 and 6 except that they do not contain any date or dates nor the notation 'To be filled', as were found on the prescriptions in this case which were filled.

That he (Needelman) stated that the reason he left the Bruches' prescriptions at the Medical Arts store instead of at his office was because his office was usually closed before Abe Bruches finished his daily employment.

That Needelman admitted having had all of the Bruches' prescriptions produced by 'offset' printing through the Lily Company's salesman calling at the office.

That Dr. Needelman also surrendered up Exhibits 13b, c, d, e, and f, to Agent Rudd, which were remaining on hand at Needelman's office upon his return from Europe on or about September 22, 1955.

That Dr. Needelman acknowledged and explained that he had left Exhibits 7, 8, 9, 10, 11, 13b, c, d, e, f, 15 and 16 in the office girl's reception desk in his outer office, undated, and that each time anyone of the persons named as patients in those prescriptions came to the office for a 'treatment' that they were to be given one of those prescriptions as 'treatment', that the date August 6, 1955, as well as the date on which the prescriptions were given, were to be inserted and written onto the face of the prescription together with the words 'To be filled' immediately following the date on which persons actually obtained the prescriptions, and that the usual fee of $10.00 and $5.00 set by Needelman was to be collected from those people named in the prescriptions for each prescription and that the money thus collected was to be deposited in the bank to his (Needelman) personal account.

That upon request of Agent Rudd, Needelman did produce for the examination of Agent Rudd, and officers Waters and Bellinger, his office 'Daily Book' which was checked against issued prescriptions named herein above and was found to be substantially correct as to the number handed out by the office girls during the period August 6 to [fol. 415D] September 22, 1955. That in explanation to notations in his 'Daily Book' of figures such as $20.00 for some instances in regard the prescriptions in this case, Dr.

Needelman explained that there were occasions when one of the persons getting the prescriptions such as Fidel Garcia was unable to come to his office the day or so following one visit and that he was given two prescriptions for different dates which he, Needelman, regarded as two treatments and so stated to the officers thereby a double fee totaling $20.00 was collected for two prescriptions.

That he admitted to Agent Rudd he had not told the above named addicts when or on what dates to appear at his office or the drug store for their supply of narcotics, that he just assumed they would be coming back for more prescriptions during his absence in Europe and that he told 'those addicts' before he left town that the prescriptions would be there for them.

That he was asked by Agent Rudd if he (Needelman) knew that codeine, methadon and demerol were narcotics and that each of them were capable of maintaining addiction and that Dr. Needelman replied in the affirmative.

That he was asked by Agent Rudd if he (Needelman) believed, in view of the amounts dispensed through the prescriptions in this case to 'those addicts', that they were addicted to those drugs and he (Needelman) replied in the affirmative.

That he (Needelman) was asked by Agent Rudd if it was his belief as a Doctor that if these addicts, the Bruches, Fidel Garcia, Gerald Miller, Harvey Sachs, and Alice Buonaiuto were stopped 'right now' from using these drugs would they suffer physical withdrawal symptoms and could they be cured, and Dr. Needelman did reply that he imagined they would experience symptoms of withdrawal and that they probably could be cured with the exception that it was his belief (Needelman's) that Abe Bruches had been using narcotics so long he did not believe he could be cured.

That in answer to Agent Rudd's specific question Dr. Needelman did acknowledge that 24 tablets of any narcotics such as Codeine or Methadon according to the size prescribed is known to be intended in the medical profession as 24 separate doses.

Needelman was then asked by specific question by Agent Rudd, 'In your opinion, as a Medical Doctor, has it been possible and is it possible for each of these addicts, Gerald

Miller, Harvey Sachs and Alice Buonaiuto to be withdrawn from the Methadon they have been using up to this time without them suffering any ill effect other than withdrawal discomfort?", and that Needelman replied 'It is possible, [fol. 415½] but they say they need it'.

That on the occasion of the September 22nd visit to Dr. Needelman's office by Agent Rudd as per testimony herein and above the investigation and inspection at his office could not be completed then and there on that date due to the absence from Needelman's office of both of the girls, Lillian Fredrick and Sally Rossman and Dr. Needelman being unable, at that visit, to produce his last required annual narcotic inventory.

That on September 23rd, 1955, Agent Rudd, accompanied by Agent Waters, again visited Dr. Needelman's office for the purpose of continuing this investigation and inspection of Dr. Needelman's narcotic activities. At that time it was ascertained that Dr. Needelman did not keep any narcotic dispensing record for reasons as he stated that he did not dispense any narcotics at all to any patients to take home with them. That in his regular practice and attention to patients, other than the addicts named herein above, he did not find it necessary to administer at his office any more than one dose of narcotics if such sedation was indicated at all.

That upon being shown six Miami Beach Police Department photos by Agent Rudd, Dr. Needelman did identify and name the photos as being pictures of Fidel Garcia, Gerald Miller, Harvey Sachs, Alice Buonaiuto, Abe Bruches and Lottie Bruches and that they were the same persons named in the prescriptions in this case.

That on September 23, 1955, Agent Rudd, accompanied by Agent Waters, met and interviewed Sally Rossman, an office girl receptionist, employed in Dr. Needelman's office. That she stated and identified, by means of her handwriting, that she wrote in the notation 'To be filled' on all of the prescriptions listed herein as Exhibits 7, 8, 9, 10, 11, 13e, 13e, and 13f, as per instructions of Dr. Needelman upon his departure from Miami Beach on or about August 6, 1955.

That pursuant to instructions from Dr. Needelman, she also wrote onto practically all of the prescriptions listed

herein as Exhibits 7, 8, 9, 10, 11, 15 and 16 the date August 6, 1955, and by means of the same identification can identify which of those prescriptions she inserted the date following the words 'To be filled' which was the date she furnished prescriptions to the above named addicts, as they came to Dr. Needelman's office for their prescriptions.

That she is but recently out of school and has worked for Dr. Needelman but a short time, is not a professional nurse [fol. 415F] and in this case she explains her actions as merely following the instructions of Dr. Needelman and/or office girl Lillian Fredricks.

That on September 27, 1955, Agent Rudd, accompanied by officers Waters and Bellinger, again visited Dr. Needelman's office for the purpose of interviewing office girl Lillian Fredricks, who up to that time had been absent from that office on a vacation. That she also, as had Dr. Needelman and Sally Rossman, identified, without assistance, each of the above described photos.

That by means of her own handwriting notations she identified the prescriptions of this case which she personally had inserted the second date where it appears on each of the prescriptions, which to her represents the day that the prescriptions were furnished to the persons named on the prescriptions.

That she is not a professional nurse and that in furnishing the prescriptions as described herein she merely followed instructions to her by Dr. Needelman at the time of his departure on or about August 6, 1955.

Agent Rudd will further testify that on September 28, 1955, assisted by officers Waters and Bellinger and during another official visit to the Medical Arts Pharmacy, 1500 Washington Avenue, Miami Beach, Florida, in connection with this investigation, defendant Walter Waxman did identify and name each one of the photos described herein and above of Abe and Lottie Bruches, Fidel Garcia, Gerald Miller, Harvey Sachs, and Alice Buanaiuto. That he (Waxman) stated that on the date (August 6, 1955) Dr. Needelman left Miami Beach for Europe Needelman brought to him at his drug store the Abe and Lottie Bruches' prescriptions and other numerous prescriptions

such as for Garcia, Miller, Sachs, etc., Needelman saying to him (Waxman) that they were his patients and anytime they came to the store to complete the filling out by dating one of the prescriptions and to charge the persons at the rate of $2.50 each for the Bruches' prescriptions and $10.00 each for any of the others, dispense the narcotics, and hold his (Needelman's) fee for him until his return from Europe.

That he (Waxman) objected to handling the prescriptions other than for the Bruches, but did agree to handle the Bruches' prescriptions as per Dr. Needelman's request. Waxman stating to Agent Rudd that he did it for the Bruches because the narcotics prescribed was only Codeine, but that he told Dr. Needelman that he did not want anything to do with handling of the Methadon prescriptions. [fol. 415G] That in accordance with Dr. Needelman's request he did dispense 24 1 gr. Codeine tablets each time Abe Bruches called at the store for his narcotics during the period August 6 to September 22, 1955, also occasionally in the same amount for Lottie Bruches.

That during the period in question, the Codeine narcotics represented by prescriptions listed herein as Exhibits 5 and 6 was dispensed to Abe and Lottie Bruches by himself or his hired pharmacists in his absence and on his (Waxman's) instructions and authority to them. That on September 22, 1955, $175.00 collected from the Bruches was handed over to Dr. Needelman by Mrs. Waxman.

That as a professional pharmacist he knows that the words Methadon and Dolophine are different trade names of one narcotic drug known as Amidone.

That the narcotics dispensed to the Bruches and all other prescriptions listed herein as Exhibits 7, 8, 9, 10, 11, was dispensed from the narcotic stock of his drug store, the Medical Arts Pharmacy, which stock of narcotics were true narcotics obtained by him in original stamped packages from lawful wholesale narcotic drug dealers pursuant to Exhibits 2, 3, and 4 of this case.

That upon discussing all of the prescriptions in this case with him (Waxman) prior to departing for Europe, Dr. Needelman told him that 'these addicts' were registered with the Bureau of Narcotics.

That defendant Walter Waxman stated to Agent Rudd that he 'most have been stupid' to have accommodated Dr. Needelman in regard prescriptions in this case. That all of the Exhibits 5-16 inclusive, which were properly initialed by officers Rudd, Waters and Bellinger at the time of seizing, have been in Agent Rudd's possession to date.

E. S. Waters, Narcotic Agent, will testify to the same facts in this case as does Agent Rudd.

R. R. Bellinger, Florida State Narcotic Inspector, will testify to the same facts in this case as does Agent Rudd and Agent Waters with exception that he was not present on occasion of the second visit to Dr. Needelman's office on September 23rd, 1955.

Recommendation: Prosecution as to both defendants.

E. S. Waters, Narcotic Agent K. C. Rudd, Narcotic Agent

[fol. 416] Minute Entry of Argument and Submission—October 21, 1958 (omitted in printing)

[fol. 417]

In the United States Court of Appeals

For the Fifth Circuit

No. 17022

Harry Needelman, Appellant,

versus

United States of America, Appellee.

Appeal from the United States District Court for the Southern District of Florida.

Before Rives, Tuttle, and Jones, Circuit Judges.

OPINION—November 14, 1958

RIVES, Circuit Judge: The appellant, a physician, and Walter Waxman, a druggist, were first tried on an indictment for conspiracy to violate Title 26, United States Code, Section 4705(a), that is, to sell certain narcotic drugs, to wit, codeine, methadon, and demerol, not in pursuance of the required written orders. The result was a mistrial.

[fol. 418] Subsequently, another indictment containing fifteen counts was returned against the appellant alone, charging him with substantive violations of the same Section. The first five counts named Gerald Miller, the next five counts named Fidele Garcia, and the last five counts named Alice Buonaiuto as the persons to whom methadon was sold or caused to be sold. Except for the names of such persons and the dates of sale, all fifteen counts were identical.

Without objection, the two cases were consolidated for trial. At the conclusion of the Government's evidence, the court granted a motion for judgment of acquittal of both defendants on the conspiracy charged, but denied Dr. Needelman's like motion on the substantive counts. The court then sustained Dr. Needelman's motion to strike all of the testimony of conversations had between the narcotic agent and Waxman outside the presence of Dr. Needelman and directed the jury to disregard any such testimony. The Government offered no additional evidence, but Dr. Needelman introduced a number of witnesses and testified in his own behalf.

At the conclusion of all the evidence, Dr. Needelman again moved for judgment of acquittal. The court denied the motion, stating in the jury's absence from the courtroom, "I think this is a very slender case, offhand, but I think there is enough to go to the jury."

The jury returned a verdict of guilty as to each of the fifteen counts. The court thereafter granted a motion for new trial as to the last five counts which named Alice [fol. 419] Buonaiuto as the purchaser; and those counts, upon motion of the Government, were dismissed by the

court. The court fined the appellant a total of $5,000.00 and placed him on probation for three years.[1]

After the mistrial on the conspiracy charge, but prior to the time of the consolidated trial, the appellant moved the court:

> ". . . for an Order permitting them to inspect the books, papers, documents, memoranda and objects and particularly the contemporaneous notes made by the Government witness, Kenneth Rudd, who has previously testified in said cause and who is a material witness for the Government in said cause, made by the said Kenneth Rudd during his investigation and preparation for trial of said cause, and which said contemporaneous notes have already been referred to by the said Rudd in the previous trial of said cause, and by which testimony it was shown that said contemporaneous notes prepared by the said Rudd were of the events, activities related to his said testimony, and that the inspection and copying of said contemporaneous notes made by the said Rudd are material and necessary for the defendants to prepare their defense."

[fol. 420]. The motion was denied. Again, after the narcotic agent Rudd had testified on direct examination on the second trial, had been cross-examined by appellant's counsel, and was on redirect examination by the Government, a short recess was had, the jury retired from the courtroom, and, we assume in response to a renewal of the motion, the court ruled: "I will deny the request for the notes, because they may involve many things. You may see the case report."

---

[1] At the time of sentencing, the Judge stated:

"The Medical Association may or may not deprive him of his license. I hope they don't. I hope they think he should not be deprived of his license because undoubtedly he is a skilful Doctor. I don't know. I am not going to go back on the jury's verdict, but I personally feel that he was exceedingly careless in any event, and it is possible that the jury felt that way and found him guilty for that reason. I don't know. They shouldn't have on that basis, but being human beings they might have done so."

The questions presented for decision on appeal are whether the court erred in denying the defendant's motion for judgment of acquittal, and whether the court erred in denying the defendant's motion to be allowed to inspect the contemporaneous notes made by narcotic agent Rudd.

The issue of guilt or innocence was primarily that of good faith, that is, whether in good faith the narcotic drugs were dispensed by the defendant as a physician to his patients "in the course of his professional practice only." The theory of the Government's case was that the pre- [fol. 421] scriptions to the three persons named in the indictment were not issued for the relief of pain but to keep narcotic addicts comfortable. In its oral charge to the jury, the court defined the issue as follows:

> "Good faith is a matter for your determination, whether or not he did act in good faith; and good faith means that he has got to act in an honest endeavor to carry on his profession. Now, if he made a mistake or he was foolish or inept or something like that, that

---

[*] 26 U.S.C.A. §4705(e). The applicable subsections read:

"(a) *General requirement.*—It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary or his delegate.

. . .

"(c) *Other exceptions.*—Nothing contained in this section, section 4735, or section 4774 shall apply—

"(1) *Use of drugs in professional practice.*—To the dispensing or distribution of narcotic drugs to a patient by a physician, dentist, veterinary surgeon, or other practitioner registered under section 4722, in the course of his professional practice only: *Provided*, That such physician, dentist, veterinary surgeon, or other practitioner shall keep a record of all such drugs dispensed or distributed, showing the amount dispensed or distributed, the date, and the name and address of the patient to whom such drugs are dispensed or distributed, except such as may be dispensed or distributed to a patient upon whom such physician, dentist, veterinary surgeon, or other practitioner shall personally attend; and such record shall be kept for a period of two years from the date of dispensing or distributing such drugs, subject to inspection, as provided in section 4773."

wouldn't be a breach of good faith; but if he sold drugs to an addict, a known man, having good reason to know a man or woman to be an addict, and sold only for the principal purpose of supplying the addict with these drugs that he craved, that would not, of course, be in good faith.

"So, as both attorneys have told you, the issue in this case is good faith. Did Dr. Needelman act in good faith in issuing these prescriptions?"

The appellant does not question the settled proposition of law that in order for a physician to come within the exception to the statute, 26 U.S.C.A. 4705(e), note 2, *supra*, the narcotic drugs must have been dispensed or distributed to a patient or patients by the physician in good faith in the course of his professional practice only.[4]

[fol. 422] In reviewing the denial of the motion for judgment of acquittal, the evidence must be considered in the light most favorable to the Government.[5] So considered, the jury could reasonably find the following facts. Dr. Needelman was to leave for Europe on August 6, 1955, for an extended vacation. He had known a Dr. Szekely, who had practiced medicine in New York for a considerable number of years, had taken the Florida Medical Board examination, and was awaiting his certificate to practice in Florida. Dr. Szekely came to Dr. Needelman's office about a week prior to Dr. Needelman's departure to become acquainted with Dr. Needelman's patients. Dr. Szekely's Florida certificate did not arrive by the time Dr. Needelman was to leave, so Dr. Needelman made arrangements with Dr. Grier, a licensed physician with a Government narcotic license, to take charge of the office

[4] See *McBride* v. *United States*, 5th Cir. 1955, 225 F. 2d 249, 253, construing Section 2554 of the 1939 Internal Revenue Code which is substantially the same as Section 4705 of the 1954 Internal Revenue Code. See also Linder v. United States, 1925, 268 U.S. 5.

[5] Mortensen v. United States, 1944, 322 U.S. 363, 374; Glasser v. United States, 1942, 315 U.S. 60, 80; Lloyd v. United States, 5 Cir. 1955, 226 F. 2d 9, 13; Vick v. United States, 5th Cir. 1954, 216 F. 2d 228.

until Dr. Szekely received his certificate. On August 20, two weeks after Dr. Needelman's departure, Dr. Szekely's license to practice medicine in Florida was issued. All of the questioned prescriptions were delivered to the patients after Dr. Needelman had left on his vacation, but peculiarly neither Dr. Szekely nor Dr. Grier was called as a witness.

It was stipulated that codeine, demerol, and methadon are narcotic drugs as defined in Title 26, United States Code, Section 4731. Miss Sally Rossman testified that she was employed by Dr. Needelman from June 1955 through November 1955 doing laboratory work, assisting the Doctor and covering the front desk when needed. [fol. 423] She identified thirty one prescriptions which Dr. Needelman signed and left with her and Miss Fredericks, the other nurse in the office, with instructions that they were to be kept locked in a drawer of a desk, and when the patients whose names appeared on the prescriptions came in and paid a prescribed fee, varying from five to ten dollars, a prescription was to be delivered to the patient. At the time of delivery, she would fill in on the prescription that date as the date on which it was "to be filled." Those three words were written by her at Dr. Needelman's direction prior to his departure. Among such patients were the three named in the indictment. Miss Rossman was extensively cross-examined in an effort to show that the prescriptions were delivered only at the direction of Dr. Szekely or Dr. Grier, and did waver somewhat in her testimony. The jury, however, could have reasonably believed that payment of the required fee was all that was necessary for a patient to receive a prescription for narcotic drugs signed by Dr. Needelman.

Miss Lillian Fredericks, the other nurse who had worked in Dr. Needelman's office, identified some twenty-nine additional prescriptions for narcotic drugs signed by Dr. Needelman and which bore her handwriting as to the dates on which they were to be filled. In general, her testimony was similar to that of Miss Rossman.

In addition, Dr. Needelman had left at the Medical Arts Pharmacy, of which Walter Waxman was proprietor, some seventy five signed prescriptions for narcotic drugs, some

to be delivered to Abe Bruches and some to his wife, Lottie Bruches. As each prescription was delivered, $2.50 would [fol. 424] be collected and retained for Dr. Needelman, purportedly, however, to apply on an old bill owed by the Bruches to Dr. Needelman rather than for the prescriptions themselves.

Narcotic agents Rudd and Waters testified to examining the narcotic prescription file at the Medical Arts Pharmacy on September 22, 1955, just after Dr. Needelman's return from Europe, and to interviewing Dr. Needelman. Each testified that, after being warned and informed as to his rights not to give incriminating evidence against himself, Dr. Needelman talked freely, and stated that he knew the patients in question were narcotic addicts and that the $175.00 left at the drug store by the Bruches was for prescriptions left there by Dr. Needelman at the rate of $2.50.

Dr. Needelman denied having made any such admissions, and testified and introduced evidence tending to show that the patients were suffering pain and that the prescriptions were signed and left by him in the course of his professional practice only. There was additional evidence on either side of the issue. Enough has been recited, however, to demonstrate that, considered in the light most favorable to the Government, there was sufficient relevant evidence from which the jury could reasonably have believed beyond a reasonable doubt that Dr. Needelman did not in good faith dispense or distribute the narcotic drugs to patients in the course of his professional practice only. The motion for judgment of acquittal was therefore properly denied.

[fol. 425] Narcotic agent Rudd did not use his memoranda or notes to refresh his recollection while testifying, but admitted that he refreshed his recollection from them before testifying. Such memoranda or notes made contemporaneously by the witness for the purpose of refreshing his own recollection are not strictly within the rule of *Jencks* v. *United States*, 1957, 353 U.S. 657, or of the statute passed to meet that decision, 18 United States Code 3500, which relate to formal written statements or reports made by the witness and signed or otherwise adopted or approved by him. Unlike such statements or

reports, the mere memoranda or notes could not be directly introduced for impeachment purposes, but might be used as a basis for cross-examining the witness. The case of *Goldman v. United States*, 1942, 316 U.S. 129, holding that it is discretionary with the trial court to require or not to require a witness to produce memoranda or notes from which he had refreshed his recollection before taking the stand, was not overruled by *Jencks, supra.*[1] In our opinion, there was no abuse of discretion in denying permission to examine Rudd's memoranda or notes, but permitting appellant's counsel to see the case report.

Finding no reversible error in the record, the judgment is affirmed.

[fol. 426]

IN UNITED STATES COURT OF APPEALS

No. 17022

HARRY NEEDELMAN,

versus

UNITED STATES OF AMERICA.

JUDGMENT November 14, 1958

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be and the same is hereby affirmed.

---

[1] See our recent opinion of Lambert v. United States, No. 17,143, 5th Cir. 1958, ____ F. 2d ____. See also, Jencks v. United States, 1957, 353 U.S. 657, at pages 668, 674, 680.

[fol. 427]

IN UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 17,022

HARRY NEEDLEMAN, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee.

Appeal from the United States District Court for the Southern District of Florida, Miami Division

---

PETITION FOR REHEARING. Filed December 2, 1958

To the Honorable Judges of the United States Court of Appeals for the Fifth Circuit:

Comes now your Petitioner, Harry Needleman, and respectfully petitions this Court to grant him a rehearing of his appeal herein and for grounds thereof would show unto the Court that in its judgment and opinion rendered herein, the Court failed to take into consideration the following facts:

[fol. 428]

1.

That the case of *Goldman* v. *U. S.*, 316 U. S. 129, cited by this Court in its opinion is inapplicable. This case is to the effect that where a witness does *not* use his notes in court, a party has no absolute right to have them produced and to inspect them. However, in the case at bar, the record shows that the court instructed the witness Rudd to "bring in the records after you are excused from the witness stand" (Tr. 232) and that after bringing in said records and referring thereto during his testimony he continued to testify therefrom (Tr. 248, 249).

2.

That the government failed to offer into evidence prescriptions allegedly issued to Fidel Garcia on August 8, 12, 14 and 17, 1955, as proof of the charges contained in counts six, eight, nine and ten of the indictment.

3.

That it affirmatively appears from the testimony herein that the physical condition of Gerald Miller and Fidel Garcia, at the time they were issued any prescriptions, was such that they required such prescriptions for the relief of pain.

4.

That the government failed to show that the physical condition of Gerald Miller and Fidel Garcia at the time they were issued the prescriptions involved in the first ten counts of the indictment was such that they did not require such prescriptions for the relief of pain.

[fol. 429]

5.

That the medical record of Gerald Miller (defendant's exhibit 9) affirmatively shows that he received a diathermy treatment on each occasion that he obtained a prescription.

6.

That the record shows that Garcia was the only patient ever able to get a prescription from Dr. Needelman's office, during his absence, without consultation with either Dr. Szekely or Dr. Grier.

Respectfully submitted,

Ernest E. Roberts, Attorney for Harry Needelman.

[fol. 430]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 17,022

[Title omitted]

Appeal from the United States District Court for the Southern District of Florida

---

PRELIMINARY ORDER ON PETITION FOR REHEARING—January 5, 1959

Before Rives, Tuttle and Jones, Circuit Judges.

Per Curiam:

Certiorari having recently been granted in several cases,[1] the decision of one or more of which may affect the disposition of this case, the parties may, if they see fit, show cause why the Court should not await the decision of one or more of said cases by the Supreme Court before ruling on the petition for rehearing.

---

[1] Certiorari granted December 8, 1958, in the following: No. 435, Lev v. United States, No. 436, Wood v. United States, No. 437, Rubin v. United States, No. 451, Rosenberg v. United States, No. 457, Ingram v. United States, No. 471, Palermo v. United States (Oct. Term 1958, 27 LW 3175, 3176). Certiorari granted December 15, 1958, in No. 489, Pittsburgh Plate Glass Co. v. United States, Oct. Term 1958, 27 LW 3186.

[fol. 431]

IN UNITED STATES COURT OF APPEALS

[Title omitted]

ORDER DENYING REHEARING—July 6, 1959

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

[fol. 432] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 433]

SUPREME COURT OF THE UNITED STATES

No. 278, October Term, 1959

[Title omitted]

ORDER ALLOWING CERTIORARI—October 12, 1959

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Review Printing Company Miami, Florida

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
AUG 4 1959
JAMES R. BROWNING, Clerk

SUPREME COURT OF THE UNITED STATES

No. 278

October Term, 1958

HARRY NEEDELMAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

A. C. DRESSLER
1408 Ainsley Building
Miami 32, Florida
Attorney for Petitioner

HILTON R. CARR, JR. &
HERBERT A. WARREN, JR.
1408 Ainsley Building
Miami 32, Florida
Of Counsel for Petitioner

SUBJECT INDEX

	Page
Opinion Below	1
Jurisdiction	2
Constitutional Provisions and Statutes Involved	2
Questions Presented	5
Reasons for Granting the Writ	7
Conclusion	20
Appendix A — Opinion Below	App. 1
Appendix B — Judgment Below	App. 10
Appendix C — Order Denying Rehearing	App. 12
Appendix D — Constitutional Provisions and Statutes Involved	App.

AUTHORITIES

Cases	Page
Galax Mirror Co., Inc. v. United States, No. 491 October Term 1958, decided June 22, 1959 (not yet reported)	8
Goldman v. United States, 316 U.S. 129, 62 S. Ct. 993, 86 L. Ed. 1322	7, 14, 15, 16, 20
Jencks v. United States, 353 U.S. 657, 77 S. Ct. 1007, 1 L. Ed. 2d 1103	6, 8, 15, 16, 19
Lev. v. United States, No. 435, October Term 1958, decided June 22, 1959 (not yet reported)	8, 10, 11
National Labor Relations Board v. Adhesive Products Corporation, 258 F. 2d 403	15, 16, 17
Palermo v. United States, No. 471, October Term 1958, decided June 22, 1959 (not yet reported)	8, 12, 13, 14
Pittsburgh Plate Glass Co. v. United States, No. 489, October Term 1958, decided June 22, 1959 (not yet reported)	8
Rubin v. United States, No. 437, October Term 1958, decided June 22, 1959 (not yet reported)	8, 11
Schneiderman v. United States, 106 F. Supp. 731, 735, 736	18
Wool v. United States, No. 436, October Term 1958, decided June 22, 1959 (not yet reported)	8

FEDERAL STATUTES

18 U.S.C. §3500	2, 8, 9, 10, 12, 13, 14, 17, 19, 20

CONSTITUTIONAL PROVISION

Amendment VI, United States Constitution	18

MISCELLANEOUS

27 Law Week, page 3308	11

SUPREME COURT OF THE UNITED STATES

No.

October Term, 1958

HARRY NEEDELMAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

TO THE HONORABLE, THE CHIEF JUSTICE, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioner, HARRY NEEDELMAN, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on November 14, 1958.

OPINIONS BELOW

The opinion of the Court of Appeals (infra Appendix A, pages App. 1 through App. 9) is reported at 261 F. 2d 802. No written opinion was delivered in the District Court.

JURISDICTION

The judgment of the Court of Appeals was entered on November 14, 1958 (infra Appendix B, page App. 10-11. An Order denying petition for rehearing was entered by the Court of Appeals on July 6, 1959 (infra Appendix C, page App. 12-13). The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. §1254(1). The basis for federal jurisdiction in the Court of First Instance was 26 U.S.C. §4705(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions and statutes involved in this case are as follows:

1. 18 U.S.C. §3500, as set forth hereinafter in Appendix D, page App. 14-15.

2. The sixth Amendment to the Constitution of the United States, as set forth hereinafter in Appendix D, page App. 16.

STATEMENT OF THE CASE

The petitioner, a physician, and a druggist were first tried on an indictment for conspiracy to violate 26 U.S.C. 4705(a). A mistrial resulted. Subsequently another indictment was returned against the petitioner alone charging him with substantive violations of 26 U.S.C. 4705 (a). The two cases were consolidated for trial.

After the mistrial on the conspiracy charge but

prior to the consolidated trial the petitioner moved the court:

> " . . . for an Order permitting them to inspect the books, papers, documents, memoranda and objects and particularly the contemporaneous notes made by the Government witness, Kenneth Rudd, who has previously testified in said cause and who is a material witness for the Government in said cause, made by the said Kenneth Rudd during his investigation and preparation for trial of said cause, and which said contemporaneous notes have already been referred to by the said Rudd in the previous trial of said cause, and by which testimony it was shown that said contemporaneous notes prepared by the said Rudd were of the events, activities related to his said testimony, and that the inspection and copying of said contemporaneous notes made by the said Rudd are material and necessary for the defendants to prepare their defense."

The motion was denied. Again, after the narcotic agent, Rudd, had testified at the consolidated trial on direct examination, had been cross-examined by petitioner's counsel and was on re-direct examination by the government, a short recess was had and the court ruled:

> "I will deny the request for the notes because they may involve many things. You may see the case report." (**infra**, Appendix A, page App. 4.)

The narcotic agent Rudd testified as to conversations with the petitioner wherein the petitioner stated, accord-

ing to Rudd, that the petitioner knew that certain patients who obtained prescriptions for narcotics were narcotic addicts. The petitioner denied making any such statements.

At the close of the government's case a motion for judgment of acquittal was granted as to both defendants on the conspiracy charge, but petitioner's motion for judgment of acquittal on the substantive charges was denied. At the conclusion of all the evidence the petitioner again moved for judgment of acquittal, which motion was denied by the trial court with the statement:

> "I think this is a very slender case, off-hand, but I think there is enough to go to the jury."

The jury returned a verdict of guilty as to each of the fifteen substantive counts. The trial court thereafter granted a motion for new trial as to five counts of the indictment and those counts, upon motion of the government, were dismissed by the court. The court fined the petitioner the total of $5,000 and placed him on probation for three years.

The petitioner filed his notice of appeal from the judgment of conviction in the Court of Appeals for the Fifth Circuit. On November 14, 1958 the Court of Appeals for the Fifth Circuit affirmed the judgment of conviction. Circuit Judge Rives wrote the opinion which was concurred in by Circuit Judges Tuttle and Jones. A petition for rehearing was denied on July 6, 1959.

QUESTIONS PRESENTED

1. WHERE A DEFENDANT IN A CRIMINAL PROSECUTION, AT THE BEGINNING OF THE TRIAL AND ALSO WHILE A GOVERNMENT AGENT IS ON THE WITNESS STAND, MOVES FOR THE PRODUCTION AND INSPECTION OF THE NOTES AND MEMORANDA MADE BY SUCH GOVERNMENT AGENT CONTEMPORANEOUSLY WITH HIS INVESTIGATION AND USED BY SUCH GOVERNMENT AGENT BEFORE TESTIFYING, TO REFRESH HIS RECOLLECTION, DOES THE DENIAL BY THE TRIAL COURT OF THE DEFENDANT'S MOTION WITHOUT AN INSPECTION BY THE TRIAL COURT OF SUCH NOTES AND MEMORANDA CONSTITUTE A PREJUDICIAL DENIAL TO DEFENDANT OF THE PROCEDURES PROVIDED FOR IN 18 U.S.C. §3500?

2. WHETHER THE RULE ANNOUNCED BY THIS COURT IN GOLDMAN V. U.S., 1942, 316 U.S. 129, 132, 62 S. Ct. 993, 995, 86 L. Ed. 1322, TO THE EFFECT THAT A TRIAL JUDGE HAS THE DISCRETION TO DENY A DEFENDANT IN A CRIMINAL PROSECUTION THE RIGHT TO INSPECT NOTES AND MEMORANDA MADE BY A GOVERNMENT AGENT DURING HIS INVESTIGATION AND USED BY SUCH GOVERNMENT AGENT TO REFRESH HIS RECOLLECTION BEFORE TESTIFYING AS A WITNESS FOR THE GOVER'-

MENT, HAS BEEN OVERRULED BY THIS COURT IN JENCKS V. U.S., 1957, 353 U.S. 657, 77 S. Ct. 1007, 1 L. Ed. 2d 1103, and BY THE STATUTE, 18 U.S.C. §3500.

3. WHETHER, WHEN A DEFENDANT IN A CRIMINAL PROSECUTION MOVES, WHILE A GOVERNMENT AGENT IS ON THE WITNESS STAND, FOR THE PRODUCTION AND INSPECTION OF THE NOTES AND MEMORANDA MADE BY SUCH GOVERNMENT AGENT CONTEMPORANEOUSLY WITH HIS INVESTIGATION AND USED BY SUCH GOVERNMENT AGENT BEFORE TESTIFYING TO REFRESH HIS RECOLLECTION, DOES THE DENIAL BY THE TRIAL COURT OF THE DEFENDANT'S MOTION UPON THE SOLE BASIS THAT SUCH NOTES "MAY" INVOLVE MANY THINGS CONSTITUTE A DENIAL TO THE DEFENDANT OF HIS CONSTITUTIONAL RIGHT TO COMPULSORY PROCESS FOR OBTAINING WITNESSES IN HIS BEHALF UNDER THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, PARTICULARLY WHERE THE TRIAL COURT RECOGNIZES THAT THE GOVERNMENT'S CASE IS A "VERY SLENDER CASE."

4. WHETHER, WHEN A DEFENDANT IN A CRIMINAL PROSECUTION MOVES, WHILE A GOVERNMENT AGENT IS ON THE WITNESS STAND, FOR THE PRODUCTION AND INSPECTION OF THE NOTES AND MEMO-

RANDA MADE BY SUCH GOVERNMENT AGENT CONTEMPORANEOUSLY WITH AN INVESTIGATION AND USED BY SUCH GOVERNMENT AGENT BEFORE TESTIFYING TO REFRESH HIS RECOLLECTION, DOES THE DENIAL BY THE TRIAL COURT OF THE DEFENDANT'S MOTION WITHOUT AN INSPECTION BY THE TRIAL COURT OF SUCH NOTES AND MEMORANDA TO APPRAISE THE POSSIBLE USE THE DEFENDANT COULD MAKE OF SUCH DOCUMENTS FOR IMPEACHMENT OR OTHER EVIDENTIARY PURPOSES CONSTITUTE A DENIAL TO THE DEFENDANT OF HIS CONSTITUTIONAL RIGHT TO HAVE COMPULSORY PROCESS FOR OBTAINING WITNESSES IN HIS FAVOR UNDER THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES?

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals for the Fifth Circuit in the instant case was:

1. That contemporaneous notes and memoranda prepared by a government agent during the course of his investigation and used by him before testifying to refresh his recollection are not within the scope of 18 U.S.C. §3500.

2. That the rule of **Goldman v. United States, 316 U.S. 129, 62 S. Ct. 993, 86 L. Ed. 1322,** to the effect that it is discretionary with the trial court to require or not to require a witness to produce contemporanous memoranda

or notes from which he had refreshed his recollection before taking the stand was not overruled by **Jencks v. United States, 353 U.S. 657, 77 S. Ct. 1007, 1 L. Ed. 2d 1103.**

3. That there was no abuse of discretion by the trial court in denying permission to examine such notes and memoranda of the government agent.

The Petition for Writ of Certiorari should be granted for the following reasons:

I.

A. In deciding that notes and memoranda prepared by a government agent contemporaneously with his investigation and used by him to refresh his recollection before testifying are not within the scope of 18 U.S.C. §3500, the Court of Appeals decided an important question of federal law which has not been, but should be, settled by this Court.

In **Palermo v. United States, No. 471, October Term 1958, decided June 22, 1959 (not yet reported)**, and in **Lev v. United States, Wool v. United States**, and **Rubin v. United States, Nos. 435, 436, 437, October Term 1958, decided June 22, 1959 (not yet reported)**, this Court considered the production under 18 U.S.C. §3500 of statements made by a government witness to an agent of the government. **Pittsburgh Plate Glass Co. v. United States, No. 489, October Term 1958, and Galax Mirror Co., Inc. v. United States, No. 491, October Term 1958, decided June 22, 1959 and not yet reported**, concerned production of a witness' prior testimony before a grand jury. This Court has not passed upon the question as to whether or not 18 U.S.C.

§3500 encompasses contemporaneous notes and memoranda prepared by a government agent during his investigation and used by him to refresh his recollection prior to testifying. To be sure, counsel for defendants in criminal cases have attempted in the past to obtain the investigative notes and reports of government agents and undoubtedly will attempt to do so in the future. The extent to which defense counsel is entitled under 18 U.S.C. §3500 to such contemporaneous notes and memoranda when the government agent takes the stand to testify against a defendant is an important question of federal law, the immediate clarification of which will aid counsel and the courts in the proper administration of criminal law and procedure.

The Court of Appeals for the Fifth Circuit has decided in the instant case that contemporaneous notes and memoranda made by a government agent during the course of his investigation and used by him to refresh his recollection before testifying are not within the scope of 18 U.S.C. §3500. The petitioner respectfully submits that such decision is manifestly contrary to the specific wording and intent of 18 U.S.C. §3500.

Sub-section (a), 18 U.S.C. §3500, deals solely with statements made by a government witness to a government agent, which situation is not present in the case at bar. However, sub-section (b) of 18 U.S.C. §3500, does cover the situation of the case at bar, that is, where the government agent is the witness who is testifying. Subsection (b) provides:

> "(b) After a witness, called by the United States, has testified on direct examination, the court

> shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified . . ."

The government agent, Rudd, was called as a witness by the United States in the instant case. He had testified on direct, cross, and re-direct when the motion of the defendant for production of his contemporaneous notes and memoranda was denied. The only remaining question is whether the notes and memoranda of Rudd constituted a "statement" under the definition contained in sub-section (e) of 18 U.S.C. §3500. Sub-section (e) of 18 U.S.C. §3500 provides:

> "(e) The term 'statement' . . . means (1) a written statement made by said witness and signed or otherwise adopted or approved by him."

The notes and memoranda of Rudd used by him met all the requirements of sub-section (e)(1). The notes were written, were made by the witness, and were certainly adopted or approved by him by the very act of using such notes to refresh his recollection before testifying concerning the events which he recorded in his notes. The petitioner submits that the notes and memoranda of Rudd met every requirement of 18 U.S.C. §3500 and that the determination by the Court of Appeals that such notes are not within the scope of 18 U.S.C. §3500 cannot be upheld.

The production of notes of a government agent in a situation similar to the case at bar was discussed during oral arguments before this Court in the cases of Lev v.

United States, Wool v. United States, and **Rubin v. United States, supra.** A portion of the discussion between various members of this Court and Mr. Oscar Davis, First Assistant to the Solicitor General, as reported in 27 Law Week at page 3308, was as follows:

> "In many instances, the Assistant to the Solicitor General continued, the face of the document shows it is not producible. There may be a three-hour interview with a fifty-line summary.
>
> "Mr. Justice Brennan: 'Suppose here there had been a statement "I talked with Carlin, but he denied knowledge of this transaction," and subsequently the witness testifies. Would that be producible?'
>
> "Mr. Davis: 'No.'
>
> "Mr. Davis asserted that counsel could cross-examine the witness as to what he said or cross-examine the agent.
>
> "Mr. Justice Black: 'Suppose the agent denies it?"
>
> "Mr. Davis: **'Then the memorandum could be produced, since it was the agent's own document and would be producible.'** " (emphasis added)

The statement made by the First Assistant to the Solicitor General is precisely the contention of the petitioner. In the case at bar the memoranda was the agent Rudd's own document and was producible. Rudd prepared

the memoranda. Rudd used the memoranda to refresh his recollection. It was his own document and could properly be used to impeach his testimony. The letter, as well as the intent, of 18 U.S.C. §3500 requires production of such memoranda. In argument upon **Palermo v. United States, supra,** government counsel again suggested the remedy of calling the interviewing agent, apparently as a means of obtaining production of the agent's memoranda of an interview with a witness (see footnote (1) to the concurring opinion of Mr. Justice Brennan).

Thus, the unusual situation is presented where government counsel admits before this Court that notes and memoranda of a government agent are producible where the agent testifies, but the Court of Appeals for the Fifth Circuit rules that such notes are not producible. This important question of federal law should be settled by this Court.

The prejudicial effect of the denial of production of Rudd's notes is apparent. The government's case was a very slender one as recognized by the trial court. The primary issue in the case was the good faith of the petitioner in prescribing narcotics for certain persons. Rudd testified that the petitioner had stated to him that petitioner knew that those certain persons were narcotic addicts. The petitioner denied making such statements (**infra,** Appendix A, page App. 8). The impeachment of Rudd's testimony was of vital importance and any inconsistency between Rudd's testimony and the notes made during his investigation could well have resulted in swaying this very slender case to the petitioner's favor.

B. In deciding that notes and memoranda prepared

by a government agent contemporaneously with his investigation and used by him to refresh his recollection before testifying are not within the scope of 18 U.S.C. §3500, the Court of Appeals for the Fifth Circuit decided such federal question in a way in conflict with the decision of this Court in **Palermo v. United States, No. 471, October Term 1958, decided June 22, 1959** (not yet reported).

The Court of Appeals, in deciding that notes and memoranda prepared by a government agent contemporaneously with his investigation and used by him to refresh his recollection before testifying are not within the scope of 18 U.S.C. §3500, predicated its decision upon two premises, both of which premises this Court rejected in **Palermo v. United States, supra.** The Court of Appeals determined that the notes of Rudd were not within 18 U.S.C. §3500 because:

(1) 18 U.S.C. §3500 relates to *formal* written statements or reports made by the witness and signed or otherwise adopted or approved by him, and

(2) such memoranda or notes could not be directly introduced for impeachment purposes, but might be used as a basis for cross-examining the witness.

The *formality* of a written statement is no criteria of whether it should be produced under 18 U.S.C. §3500. As stated by this Court in **Palermo v. United States, supra**:

> **"We find the legislative history persuasive that the statute was meant to encompass more than mere automatic reproductions of oral statements."**

Thus, the restriction by the Court of Appeals of 18 U.S.C. §3500 to *formal* written statements is not in accord

with the decision of this Court in **Palermo v. United States, supra.**

Likewise, the admissibilty in evidence of a statement sought to be produced is of no importance in determining whether the statement should be produced under 18 U.S.C. §3500. As stated by Mr. Justice Frankfurter in **Palermo v. United States, supra:**

> "The statute governs the production of documents; it does not purport to affect or modify the rules of evidence regarding admissibility and use of statements once produced."

And, as stated by Mr. Justice Brennan in **Palermo v. United States, supra,**

> "The statute is to be given a reasonable construction and the courts must not lose sight of the fact that the statute regulates *production* of material for possible use in cross examination, and does not regulate *admissibility* into evidence — as the Court properly observes."

The Court of Appeals decided that notes and memoranda prepared by a government agent contemporaneously with his investigation and used by him to refresh his recollection before testifying are not within the scope of 18 U.S.C. §3500. In predicating its decision upon a lack of formality of the statement and its inadmissibility into evidence, the Court of Appeals has decided a federal question in a way in conflict with the decision of this Court in **Palermo v. United States, supra.**

II.

A. In deciding that the rule in **Goldman v. U.S., 316 U.S. 129, 62 S. Ct. 993, 86 L. Ed. 1322,** to the effect that it

is discretionary with the trial court to require or not to require a witness to produce memoranda or notes from which he had refreshed his recollection before taking the stand, was not overruled by **Jencks v. U.S., 353 U.S. 657, 77 S. Ct. 1007, 1 L. Ed. 2d 1103**, the Court of Appeals for the Fifth Circuit has rendered a decision in conflict with the decision of the Court of Appeals for the Second Circuit in the case of **National Labor Relations Board v. Adhesive Products Corporation, 258 F. 2d 403.**

The Court of Appeals for the Fifth Circuit ruled in the instant case that the case of **Goldman v. United States, supra,** was not overruled by **Jencks v. United States, supra,** and that, therefore, it was discretionary with the trial court to require or not to require a witness to produce memoranda or notes from which he had refreshed his recollection before taking the stand. The Court of Appeals for the Second Circuit has ruled exactly to the contrary in **National Labor Relations Board v. Adhesive Products Corporation, 258 F. 2d 403.** In that case, the Court of Appeals for the Second Circuit considered the question as to whether a statement admittedly used by a witness to refresh his recollection shortly prior to testifying at an administrative hearing must be produced on demand by counsel for the purposes of cross-examination. The Court of Appeals for the Second Circuit, after discussing **Goldman v. United States, supra,** ruled that under **Jencks v. United States, supra,** such statement must be produced. The Second Circuit further decided that such rule would apply in an administrative hearing as well as in a criminal trial.

Thus there exists a direct conflict between two circuits on a point of law. The Fifth Circuit holds that **Gold-**

man v. United States, supra, is still the law and that the trial court has the discretion to deny production of memoranda used by a witness to refresh his recollection prior to testifying. The Second Circuit takes the view that **Goldman v. United States, supra,** was overruled by **Jencks v. United States, supra,** and that production of such memoranda must be required. This contrariety of views between circuits should be settled by this Court.

B. In deciding that the rule in **Goldman v. U. S., 316 U.S. 129, 62 S. Ct. 993, 86 L. Ed. 1322,** to the effect that it is discretionary with the trial court to require or not to require a witness to produce memoranda or notes from which he had refreshed his recollection before taking the stand, was not overruled by **Jencks v. U. S., 353 U. S. 657, 77 S. Ct. 1007, 1 L. Ed. 2d 1103,** the Court of Appeals for the Fifth Circuit decided an important question of federal law which has not been, but should be, settled by this Court.

What is the rule of law which governs the production and inspection of notes made by a government agent during his investigation and used by him to refresh his recollection before testifying? **Goldman v. United States, supra,** states that the trial court has discretion to deny such production. **Jencks v. United States, supra,** appears to overrule **Goldman v. United States** and requires production. Mr. Justice Clark, in his dissent in **Jencks,** states that **Goldman** is not overruled by **Jencks** but "is left on the books to haunt lawyers and trial courts in their search for the proper rule." **Jencks v. United States, 353 U.S. 657, at 680.** The Court of Appeals for the Fifth Circuit says, in the instant case, that **Goldman** is not overruled by **Jencks.** The Second Circuit says, in **National**

Labor Relations Board v. Adhesive Products Corporation, 258 F. 2d 403, that **Jencks** not **Goldman** states the proper rule. The provisions of 18 U.S.C. §3500 appear to cover the production of such notes and would therefore supersede the rule of **Goldman.** But the Fifth Circuit has ruled in the instant case that such notes are not within the scope of 18 U.S.C. §3500.

In the midst of such a divergence of views one point is exceedingly clear; that is, that a definitive statement by this Court as to the rule of law governing production and inspection of such notes is essential. This is a matter of the everyday practice of law in the federal courts, and a matter which can present itself in every instance where a government agent takes the witness stand. The petitioner respectfully urges the court to settle this important question of federal law by stating the rule of law which should be applied.

III.

In deciding that there was no abuse of discretion by the trial court in denying the motion of the defendant for production and inspection of the contemporaneous notes and memoranda prepared by a government agent during the course of his investigation and used by him to refresh his recollection before testifying, the Court of Appeals sanctioned such a departure by the trial court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The trial court denied the motion of the petitioner for production of notes and memoranda made by a govern-

ment agent during the course of his investigation and used by him to refresh his recollection before testifying, without any examination by the trial court of the notes and memoranda and solely "because they may involve many things." The Court of Appeals, in ruling that such action by the trial court did not constitute an abuse of discretion, sanctioned a departure from the accepted and usual course of judicial proceedings which endangers the constitutional rights of all defendants in criminal cases.

As stated in **United States v. Schneiderman, 106, F. Supp. 731, 735, 736:**

> "The court's discretionary power to compel production of a document must be exercised in the light of the requirement of the 6th Amendment that:
>
> > 'In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . .' (U.S. Const., Amend. VI) . . .
>
> "Proper exercise of judicial discretion in determining whether to compel production requires in every case that any public policy militating against public disclosure of the document be weighed against the interests of the accused in having the document for use in making a defense to the charge."

In exercising their discretionary power in the past, the courts adopted the procedure of an *in camera* inspection of the documents in order to weigh public policy

against the interests of the accused (see cases cited in **Jencks v. United States, supra, at page 676, footnote 4).** This procedure was disapproved in **Jencks v. United States, supra.** The statute, 18 U.S.C. §3500 provided a method for the excising by the trial court of portions of a document which the trial court feels should not be revealed to the defendant. In any event, the courts have ever been diligent to preserve constitutional rights of defendants under the Sixth Amendment and to deny production of relevant documents to them only where the possible evidentiary value of the document to the defendant was outweighed by some public policy against disclosure. The discretion exercised by the courts was the discretion of deciding, **after examining the document,** whether the interests of the defendant or the public were paramount.

It is the position of the petitioner that the notes in question are within the scope of 18 U.S.C. §3500 and that the procedures therein prescribed should have been followed. But 18 U.S.C. §3500 is at most a procedural method for protecting the interest of the government without infringing the constitutional rights of defendants under the Sixth Amendment. The trial court in the instant case not only did not follow the statutory procedures of 18 U.S.C. §3500 but also denied to the petitioner the minimal right which has always been accorded under the Sixth Amendment; that is, the right to have the trial court, at the very least, order production of the notes for examination by the trial court in order that the trial court might weigh the evidentiary value of the document as against reasons for not disclosing the document in the interests of the public welfare or safety.

The petitioner respectfully submits that the opinion

of the Court of Appeals in the instant case cannot be permitted to remain on the law books as precedent for such a denial to a defendant of all rights under the Sixth Amendment.

CONCLUSION

The decision of the Court of Appeals for the Fifth Circuit compounds the uncertainty as to the rule of law which governs the production of notes made by a government agent during his investigation and used by him to refresh his recollection before testifying. A decision by this Court as to whether such notes are encompassed in 18 U.S.C. §3500 and as to whether the rule in **Goldman v. United States, supra,** is of any present force or effect, is essential for the guidance of trial courts and lawyers in their efforts to afford to every defendant the full measure of his right under the Sixth Amendment to the Constitution of the United States.

Respectfully submitted,

A. C. Dressler

A. C. DRESSLER
Attorney for Petitioner
1408 Ainsley Building
Miami 32, Florida

HILTO R. CARR, JR. &
HERBERT A. WARREN, JR.
1408 Ainsley Building
Miami 32, Florida
Of Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petition for Writ of Certiorari was mailed to the Solicitor General, Department of Justice, Washington 25, D.C. this 30th day August, 1959 by depositing the same in a United States post office with air mail postage prepaid and addressed to the Solicitor General, Department of Justice, Washington 25, D.C.

I FURTHER CERTIFY that a copy of the foregoing Petition for Writ of Certiorari was personally delivered to Helen Wanick, a clerk in the office of James L. Guilmartin, United States Attorney for the Southern District of Florida, Federal Building, Miami, Florida, this 31st day of August, 1959.

A. C. Dressler

A. C. DRESSLER
Attorney for Petitioner

A. C. DRESSLER
1408 Ainsley Building
Miami 32, Florida
Attorney for Petitioner
HILTON R. CARR, JR. &
HERBERT A. WARREN, JR.
1408 Ainsley Building
Miami 32, Florida
Of Counsel for Petitioner

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 17,022

HARRY NEEDLEMAN,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Southern District of Florida.

(November 14, 1958.)

Before RIVES, TUTTLE and JONES, Circuit Judges.

RIVES, Circuit Judge: The appellant, a physician, and Walter Waxman, a druggist, were first tried on an indictment for conspiracy to violate Title 26, United States Code, Section 4705(a), that is, to sell certain narcotic drugs, to wit, codeine, methadon, and demerol, not in pursuance of the required written orders. The result was a mistrial.

Subsequently, another indictment containing fifteen counts was returned against the appellant alone, charging him with substantive violations of the said Section. The first five counts named Gerald Miller, the next five counts named Fidele Garcia, and the last five counts named Alice Buonaiuto as the persons to whom methodon was sold or caused to be sold. Except for the names of such persons and the dates of sale, all fifteen counts were identical.

Without objection, the two cases were consolidated for trial. At the conclusion of the Government's evidence, the court granted a motion for judgment of acquittal of both Defendants on the conspiracy charged, but denied Dr. Needelman's like motion on the substantive counts. The court then sustained Dr. Needleman's motion to strike all of the testimony of conversations had between the narcotic agent and Waxman outside the presence of Dr. Needelman and directed the jury to disregard any such testimony. The government offered no additional evidence, but Dr. Needelman introduced a number of witnesses and testified in his own behalf.

At the conclusion of all the evidence, Dr. Needelman again moved for judgment of acquittal. The court denied the motion, stating in the jury's absence from the courtroom, "I think this is a very slender case, offhand, but I think there is enough to go to the jury."

The jury returned a verdict of guilty as to each of the fifteen counts. The court thereafter granted a motion for new trial as to the last five counts which named Alice Buonaiuto as the purchaser; and those counts, upon motion of the Government, were dismissed by the court. The

court fined the appellant a total of $5,000.00 and placed him on probation for three years.[1]

After the mistrial on the conspiracy charge, but prior to the time of the consolidated trial, the appellant moved the court:

> ". . . for an Order permitting them to inspect the books, papers, documents, memoranda and objects and particularly the contemporaneous notes made by the Government witness, Kenneth Rudd, who has previously testified in said cause and who is a material witness for the Government in said cause, made by the said Kenneth Rudd during his investigation and preparation for trial of said cause, and which said contemporaneous notes have already been referred to by the said Rudd in the previous trial of said cause, and by which testimony it was shown that said contemporaneous notes prepared by the said Rudd were of the events, activities related to his said testimony, and that the inspection and copying of said contemporaneous notes made by said Rudd are material and necessary for the defendants to prepare their defense."

---

[1] At the time of sentencing, the Judge stated:

"The Medical Association may or may not deprive him of his license. I hope they don't. I hope they think he should not be deprived of his license because undoubtedly he is a skilful Doctor. I don't know. I am not going to go back on the jury's verdict, but I personally feel that he was exceedingly careless in any event, and it is possible that the jury felt that way and found him guilty for that reason. I don't know. They shouldn't have on that basis, but being human beings they might have done so."

The motion was denied. Again, after the narcotic agent Rudd had testified on direct examination on the second trial, had been cross-examined by appellant's counsel, and was on redirect examination by the Government, a short recess was had, the jury retired from the courtroom, and, we assume in response to a renewal of the motion, the court ruled: "I will deny the request for the notes, because they may involve many things. You may see the case report."

The questions presented for decision on appeal are whether the court erred in denying the defendant's motion for judgment of acquittal, and whether the court erred in denying the defendant's motion to be allowed to inspect the contemporaneous notes made by narcotic agent Rudd.

The issue of guilt or innocence was primarily that of good faith, that is, whether in good faith the narcotic drugs were dispensed by the defendant as a physician to his patients "in the course of his professional practice only."[2]

---

[2] 26 U.S.C.A. §4705(c). The applicable subsections read:

"(a) General requirement.—It shall be unlawful for any person to sell barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary or his delegate.

. . .

"(c) Other exceptions.—Nothing contained in this section, section 4735, or section 4774 shall apply—

"(1) Use of drugs in professional practice.—To the dispensing or distribution of narcotic drugs to a patient by a physician, dentist, veterinary surgeon, or other practitioner registered under section 4722, in the course of his professional practice only: Provided, That such physician, dentist, veterinary surgeon, or other practitioner shall keep a record of all such drugs dispensed or distributed, showing the amount dispensed or distributed, the date, and the name and address of the patient to whom such drugs are dispensed or distributed, except such as may be dispensed or distributed to a patient upon whom such physician, dentist, veterinary surgeon, or other practitioner shall personally attend; and such record shall be kept for a period of two years from the date of dispensing or distributing such drugs, subject to inspection as provided in section 4773."

The theory of the Government's case was that the prescriptions to the three persons named in the indictment were not issued for the relief of pain but to keep narcotic addicts comfortable. In its oral charge to the jury, the court defined the issue as follows:

> "Good faith is a matter for your determination, whether or not he did act in good faith; and good faith means that he has got to act in an honest endeavor to carry on his profession. Now, if he made a mistake or he was foolish or inept or something like that, that wouldn't be a breach of good faith; but if he sold drugs to an addict, a known man, having good reason to know a man or woman to be an addict, and sold only for the principal purpose of supplying the addict with these drugs that he craved, that would not, of course, be in good faith.
>
> "So, as both attorneys have told you, the issue in this case is good faith. Did Dr. Needleman act in good faith in issuing these prescriptions?"

The appellant does not question the settled proposition of law that in order for a physician to come within the exception to the statute, 26 U.S.C.A. 4705 (c), note 2, supra, the narcotic drugs must have been dispensed or distributed to a patient or patients by the physician in good faith in the course of his professional practice only.[3]

---

[3] See *McBride v. United States*, 5th Cir. 1955, 225 F. 2d 249, 253, construing Section 2554 of the 1939 Internal Revenue Code which is substantially the same as Section 4705 of the 1954 Internal Revenue Code. See also *Linder v. United States*, 1925, 268 U.S. 5.

In reviewing the denial of the motion for judgment of acquittal, the evidence must be considered in the light most favorable to the government.[4] So considered, the jury could reasonably find the following facts. Dr. Needelman was to leave for Europe on August 6, 1955, for an extended vacation. He had known a Dr. Szekely, who had practiced medicine in New York for a considerable number of years, had taken the Florida Medical Board examination, and was awaiting his certificate to practice in Florida. Dr. Szekely came to Dr. Needelman's office about a week prior to Dr. Needelman's departure to become acquainted with Dr. Needelman's patients. Dr. Szekely's Florida certificate did not arrive by time Dr. Needelman was to leave, so Dr. Needelman made arrangements with Dr. Grier, a licensed physician with a Government narcotic license, to take charge of the office until Dr. Szekely received his certificate. On August 20, two weeks after Dr. Needelman's departure, Dr. Szekely's license to practice medicine in Florida was issued. All of the questioned prescriptions were delivered to the patients after Dr. Needelman had left on his vacation, but peculiarly neither Dr. Szekely nor Dr. Grier was called as a witness.

It was stipulated that codeine, demerol, and methadon are narcotic drugs as defined in Title 26, United States Code, Section 4731. Miss Sally Rossman testified that she was employed by Dr. Needelman from June 1955 through November 1955 doing laboratory work, assisting the Doctor and covering the front desk when needed. She identified thirty-one prescriptions which Dr. Needelman signed and left with her and Miss Fredericks, the other

[4] Mortensen v. United States, 1944, 322 U.S. 369, 374; Glasser v. United States, 1942, 315 U.S. 60, 80; Lloyd v. United States, 5 Cir. 1955, 226 F. 2d 9, 13; Vick v. United States, 5th Cir. 1954, 216 F. 2d 228.

nurse in the office, with instructions that they were to be kept locked in a drawer of a desk, and when the patients whose names appeared on the prescriptions came in and paid a prescribed fee, varying from five to ten dollars, a prescription was to be delivered to the patient. At the time of delivery, she would fill in on the prescription that date as the date on which it was "to be filled". Those three words were written by her at Dr. Needelman's direction prior to his departure. Among such patients were the three named in the indictment. Miss Rossman was extensively cross-examined in an effort to show that the prescriptions were delivered only at the direction of Dr. Szekely or Dr. Gr r, and did waiver somewhat in her testimony. The jury, however, could have reasonably believed that payment of the required fee was all that was necessary for a patient to receive a prescription for narcotic drugs signed by Dr. Needelman.

Miss Lillian Fredericks, the other nurse who had worked in Dr. Needelman's office, identified some twenty-nine additional prescriptions for narcotic drugs signed by Dr. Needelman and which bore her handwriting as to the dates on which they were to be filled. In general, her testimony was similar to that of Miss Rossman.

In addition, Dr. Needelman had left at the Medical Arts Pharmacy, of which Walter Waxman was proprietor, some seventy-five signed prescriptions for narcotic drugs, some to be delivered to Abe Bruches and some to his wife, Lottie Bruches. As each prescription was delivered, $2.50 would be collected and retained for Dr. Needelman, purportedly, however, to apply on an old bill owed by the Bruches to Dr. Needelman rather than for the prescriptions themselves.

Narcotic agents Rudd and Waters testified to examining the narcotic prescription file at the Medical Arts Pharmacy on September 22, 1955, just after Dr. Needelman's return from Europe, and to interviewing Dr. Needelman. Each testified that, after being warned and informed as to his rights not to give incriminating evidence against himself, Dr. Needelman talked freely, and stated that he knew the patients in question were narcotic addicts and that the $175.00 left at the drug store by the Bruches was for prescriptions left there by Dr. Needelman at the rate of $2.50.

Dr. Needelman denied having made any such admissions, and testified and introduced evidence tending to show that the patients were suffering pain and that the prescriptions were signed and left by him in the course of his professional practice only. There was additional evidence on either side of the issue. Enough has been recited, however, to demonstrate that, considered in the light most favorable to the Government, there was sufficient relevant evidence from which the jury could reasonably have believed beyond a reasonable doubt that Dr. Needelman did not in good faith dispense or distribute the narcotic drugs to patients in the course of his professional practice only. The motion for judgment of acquittal was therefore properly denied.

Narcotic agent Rudd did not use his memoranda or notes to refresh his recollection while testifying, but admitted that he refreshed his recollection from them before testifying. Such memoranda or notes made contemporaneously by the witness for the purpose of refreshing his own recollection are not strictly within the rule of **Jencks v. United States**, 1957, 353 U.S. 657, or of the sta-

tute passed to meet that decision, 18 United States Code §3500, which relate to formal written statements or reports made by the witness and signed or otherwise adopted or approved by him. Unlike such statements or reports, the mere memoranda or notes could not be directly introduced for impeachment purposes, but might be used as a basis for cross-examining the witness. The case of **Goldman v. United States,** 1942, 316 U.S. 129, holding that it is discretionary with the trial court to require or not to require a witness to produce memoranda or notes from which he had refreshed his recollection before taking the stand, was not overruled by **Jencks, supra.**[5] In our opinion, there was no abuse of discretion in denying permission to examine Rudd's memoranda or notes, but permitting appellant's counsel to see the case report.

Finding no reversible error in the record, the judgment is

AFFIRMED.

---

[5] See our recent opinion of Lambert v. United States, No. 17,143, 5th Cir. 1958, ... F. 2d ..... See also, Jencks v. United States, 1957, 353 U.S. 657, at pages 668, 674, 680.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

October Term, 1959

No. 17,022

D. C. Docket No. 10,348-M-Criminal

HARRY NEEDELMAN,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Southern District of Florida.

Before RIVES, TUTTLE and JONES, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

November 14, 1958.

A true copy
Test:

s/ Edward W. Wadsworth
EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals,
Fifth Circuit
New Orleans, Louisiana

Jul 23 1959

APPENDIX C

(Original Filed: July 6, 1959)

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 17,022

HARRY NEEDELMAN,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Southern District of Florida.

(JULY 6, 1959)

ON PETITION FOR REHEARING

Before RIVES, TUTTLE and JONES, Circuit Judges.

PER CURIAM:

The petition for rehearing in the above styled and numbered cause is hereby

DENIED.

A true copy
Test:

s/ EDWARD W. WADSWORTH
EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals,
Fifth Circuit
New Orleans, Louisiana

JUL 23 1959

APPENDIX D

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

18 U.S.C. §3500. Demands for production of statements and reports of witnesses.

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall ex-

cise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said wit-

ness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

CONSTITUTION OF THE UNITED STATES AMENDMENT VI — JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statement	2
Argument	9
Conclusion	14

CITATIONS

Cases:

Goldman v. *United States*, 316 U.S. 129	10, 11
Jencks v. *United States*, 353 U.S. 657	10, 11, 12, 13
McGill v. *United States*, C.A.D.C., No. 14,792, decided August 20, 1959	11
National Labor Relations Board v. *Adhesive Products Corporation*, 258 F. 2d 403	11, 12
Palermo v. *United States*, 360 U.S. 343	10, 13
Rosenberg v. *United States*, 360 U.S. 367	13

Statutes:

18 U.S.C. 3500	2, 10, 11
26 U.S.C. 4705(a)	2

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 278

HARRY NEEDELMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A 1-9) is reported at 261 F. 2d 802.

JURISDICTION

The judgment of the court of appeals was entered on November 14, 1958 (Pet. App. B 10-11). A petition for rehearing was denied on July 6, 1959 (Pet. App. C 12-13). The petition for a writ of certiorari was filed on August 4, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether it was prejudicial error under 18 U.S.C. 3500 for the trial court to deny petitioner the right to inspect original notes made by a witness-agent in the course of his investigation, when the substance of those notes was made available to petitioner in the form of the complete case report drawn up from the notes.

STATEMENT

An indictment returned on October 18, 1955, in the District Court for the Southern District of Florida charged petitioner and one Waxman with a conspiracy to sell narcotic drugs not in pursuance of a written order in violation of 26 U.S.C. 4705(a) (R. 2). Their trial ended in a mistrial. On October 2, 1957, a second indictment was returned charging petitioner alone with fifteen substantive violations of 26 U.S.C. 4705(a). The first five counts charged sales of narcotics on different dates to one Miller, the second five counts, similar sales to one Garcia, and the last five, to one Buonaiuto (R. 3-11).

On motion of the Government (R. 13), the two cases were consolidated for trial (R. 14). On November 19, 1957, a jury found petitioner guilty on all fifteen substantive counts (R. 17-18).[1] The court thereafter granted a motion for a new trial as to counts 11 through 15 (R. 20) and, on motion of the Government, these counts were dismissed (R. 23). On

[1] At the conclusion of the Government's evidence, the court granted a motion for judgment of acquittal on the conspiracy charge (R. 17).

counts 1 through 10, petitioner was sentenced to pay a total fine of $5000 ($500 on each count) and to a term of imprisonment for two years on each, to run concurrently. The sentence of imprisonment was suspended and petitioner was placed on probation for three years (R. 21-22). The court of appeals affirmed.

1. The Government's evidence showed that petitioner, a licensed physician, when he was about to depart for a European vacation on August 6, 1955, left over one hundred and thirty signed prescriptions for codeine, demerol, and methadon (all narcotic drugs), to be delivered during his absence to some seven persons, including Miller, Garcia, and Buonaiuto, the three persons named in the substantive indictment. Some of these prescriptions were left in his office, the others in the Medical Arts Pharmacy, the drug store owned by his co-defendant, Waxman.

Two women assistants in petitioner's office, Misses Rossman and Fredericks (named but not indicted as co-conspirators in the conspiracy charge), testified regarding the arrangements petitioner made for running his office during his intended absence. Since Dr. Szekely, who was to take over petitioner's practice, had not received his state license to practice at the time of petitioner's departure, petitioner arranged that Dr. Grier (a licensed physician with a Government narcotic license (R. 347)) also be in the office temporarily (R. 50, 81).[2]

---

[2] Both doctors were in the office until Dr. Szekely received his license on August 20th, two weeks after petitioner's de-

The office assistants further testified that petitioner instructed that the prescriptions be kept locked in a desk drawer. A prescription was to be delivered to the person in whose name it was issued when that person came in and paid a prescribed fee of five or ten dollars (R. 41, 83-86). Miss Rossman, who identified some thirty-one prescriptions (Pet. App. 6), testified that the persons to whom she delivered the prescriptions did not necessarily see or have any conversation with anyone else (R. 44). She said that during this period the usual office procedure was not always followed. Unless a patient particularly asked to see the doctor, his treatment card would not be sent in to the doctor nor would he be ushered in; he would see only her (R. 76-77). Miss Fredericks, who identified some twenty-nine prescriptions (Pet. App. 7), said that when a patient came in for one of these prescriptions, during this period, he would usually not talk to either Dr. Grier or Dr. Szekely (R. 86). When the prescriptions were delivered, the women were to, and did, write in the date of delivery opposite the words "to be filled," previously written on the prescriptions by Miss Rossman under petitioner's direction prior to his departure (R. 38, 41, 46, 85). The fees the women received were entered in a day book, and locked in the desk drawer (R. 42, 86).

The testimony of two pharmacists, likewise named as co-conspirators, identified some seventy-five prescriptions left by petitioner at the Medical Arts Pharmacy for Abe Bruches and his wife (Pet. App. 7; R.

---

parture (R. 50, 81). Petitioner returned in seven weeks (R. 339). Neither Dr. Grier nor Dr. Szekely was called as a witness at the trial.

115-170). These prescriptions were kept in a safe (R. 121) and were dated and filled by a pharmacist when Bruches came in for drugs. Bruches came in practically every day during this period for the prescribed twenty-four 1-grain codeine tablets (R. 139, 158). He gave $2 to the pharmacist for the pills (R. 121), but at the same time usually left additional money to be retained for petitioner, allegedly for payment of a past debt to the doctor (R. 132, 145, 158). The unfilled prescriptions were collected from the drug store by petitioner upon his return (R. 157). At that time, petitioner also collected the money left for him by Bruches, a total of $175 (R. 256), two dollars and fifty cents more than the amount which would have been collected had the Bruches paid an additional $2.50 for each of the prescriptions which they had filled (R. 207, 391).

Two federal narcotic agents, Rudd and Waters, testified that they contacted petitioner at his office on September 22, 1955, after they had procured the prescriptions from the drug stores at which they had been filled. They stated that petitioner, confronted with some of these prescriptions, readily admitted that he had prepared them for "those addicts"—"Those people who are old opium and heroin and morphine users" (R. 189, 191-192, 255). Petitioner admitted that he had left the prescriptions with his office girls with instructions to collect ten or five dollars in return for them (R. 192, 210-211, 255, 258-259). He said that the prescriptions for the Bruches were left at the drug store so that they would be accessible in the event his office was closed (R. 211, 256). He said that

some of the persons for whom he had written the prescriptions had been cured of the narcotic habit (R. 208-209) and that he had talked with others about a supervised cure, but that they could not go to Lexington Hospital because of their jobs (R. 209, 255). He remarked that he thought it was wonderful that, by using methadon, these people could keep working and not have to go out on the street in order to buy heroin, morphine, or a derivative (R. 209, 255). He admitted that methadon was a narcotic drug but said that it was less habit-forming than morphine and that by furnishing it he believed that he was shortening his patients' addiction to drugs (R. 209). He said that one tablet was equivalent to one dose or "one shot" of narcotics (R. 210, 255) and that he prescribed twenty-four tablets on one prescription because his patients told him that they needed it (R. 210).

The agents testified that, at subsequent interviews, petitioner, his two office girls, and co-defendant Waxman, identified police file photographs of some of the people for whom petitioner had prescribed narcotics (R. 217-218, 260). All persons receiving prescriptions, except one, were familiar to narcotic agent Rudd in connection with his official duties (R. 213).

Petitioner testified that the narcotics were prescribed in the course of his professional treatment of the persons receiving them (R. 345). He denied having had knowledge that any of the people whom he said he treated had been involved in narcotic violations (R. 377), and having admitted to the agents that he knew that his patients were addicts (R. 370).

2. After the mistrial on the conspiracy charge, but prior to the time of the consolidated trial, petitioner moved the court for an order permitting the inspection of "books, papers, documents, memoranda and objects and particularly the contemporaneous notes made by the Government witness, Kenneth Rudd, who has previously testified * * *, made by * * * Rudd during his investigation and preparation for trial * * *." The motion alleged that Rudd's testimony in the previous trial had shown that such contemporaneous notes were of the events and activities related to his testimony, and that inspection of them was material and necessary for the preparation of a defense (R. 11-12). The motion was granted only to the extent of permitting inspection of any documents or material taken from the defendants (R. 15).

At the consolidated trial, when agent Rudd was asked what percentage of petitioner's prescriptions he had found to be filled at various pharmacies, he indicated that, if he could look at his "report" or check his "files", he could tell exactly (R. 231, 233). The agent indicated that the information he needed was not available in the courtroom. The court asked him to bring in the records after he was excused from the stand (R. 232). Before Rudd left the stand, defense counsel questioned him as follows (R. 241):

> Q. You made copious notes, did you not, at the time you started the investigation of this case?
>
> A. I made several notes; yes, sir.
>
> Q. And you have refreshed your recollection from the notes that you made, refreshed your memory? Before coming to testify you re-

> freshed your memory by reference to those notes, did you not?
>
> A. Yes, sir.

Counsel then asked about the agent's examination of the files of the doctor and of the druggist (R. 241-242). During a short recess after redirect examination of of agent Rudd, there was apparently a conversation, which is not reported, between counsel and the trial judge out of the presence of the jury. The record contains merely the statement of the court (R. 248):

> I will deny the request for the notes, because they may involve many things. You may see the case report.[3]

A copy of the case report is filed herewith. It is signed by both agents Rudd and Waters and is dated October 31, 1955, some six weeks after the agents began an active investigation of the case on September 21, 1955. It covers every aspect of the Government's case including a narrative statement, a list of exhibits, and a list of witnesses and their anticipated testimony. It recites that Rudd himself would testify as to interviews with petitioner during this initial investigation. In this regard it states, *inter alia* (p. 18), that petitioner "voluntarily and spontaneously stated that he had left those prescriptions with 'those addicts' when he left for Europe. That they

---

[3] The United States Attorney's Office has advised that, according to the best recollection of agent Rudd and the Assistant United States Attorney who prosecuted this case, an undeleted copy of the complete case report was handed to petitioner's attorney pursuant to the court's statement.

were all addicts and had used opium, heroin, morphine and dilaudid, that he gave it to them to keep them comfortable, and so that they could keep going and stay on their jobs and so that they would not go out on the streets looking for heroin or dilaudid. * * * [T]hat he thought it was wonderful that 'those addicts' * * * were only taking Methadon and not using any heroin or dilaudid at exorbitant prices." The report recites further that petitioner said that he had discussed with the addicts the possibility of a cure at Lexington but they could not or would not go since they worked for a living. It recites that he admitted arranging to leave prescriptions at his office and at Waxman's pharmacy with instructions for prescribed fees (pp. 18, 19).

ARGUMENT

Petitioner argues that, when a government agent testifies at a trial, the defendant is entitled, as a matter of right, to *all* his notes relating to the subject matter of his testimony. This argument is fully consistent with petitioner's broad demand at his trial for all of agent Rudd's notes relating to the case in any way. Petitioner's pre-trial motion had asked for "the contemporaneous notes made by the Government witness, Kenneth Rudd, * * * during his investigation and preparation for trial * * *." And apparently his demand during the examination of Rudd was at least equally broad, for the trial judge, in denying the request for the notes, stated that he was doing so because the notes "may involve many things."[4]

[4] Petitioner does suggest at one point (Pet. 12) that he is claiming only the right to agent Rudd's notes of the

Answering the same contention petitioner raises here, the court of appeals held that the notes of an investigative agent "are not strictly" within the terms either of *Jencks* v. *United States*, 353 U.S. 657, or of the "Jencks" Act, 18 U.S.C. 3500, which was passed before petitioner's trial (Pet. App. A 8-9). Therefore, the court held that, as to such notes, the discretion of the trial judge, recognized in *Goldman* v. *United States*, 316 U.S. 129, 132, was left undisturbed by the *Jencks* decision and statute. In the *Jencks* case, this Court held that the trial court had no discretion to withhold from the defense the "*reports* of Matusow and Ford in [the Government's] possession, written and, when orally made, as recorded by the F.B.I., touching the events and activities as to which they testified at the trial" (emphasis added). 353 U.S. at 668. Similarly, the "Jencks" statute requires production only of "statements." And as this Court found in *Palermo* v. *United States*, 360 U.S. 343, 350, one of the reasons Congress limited the scope of 18 U.S.C. 3500 to "statements" was because it "strongly feared that disclosure of memoranda containing the investigative agent's interpretations and impressions might reveal the inner workings of the investigative process and thereby injure the national interest * * *."

The material in issue here is not a report or statement of an agent, but rather his own notes, his work product, for use in preparing his report for submission to his superiors. An investigative agent, like

---

interview with petitioner, but his argument in the petition, as well as his demand in the trial court, extends much further.

any other person, may well have a method of recording events in some abbreviated or symbolic fashion which would be unintelligible to another person. The notes may require association with subjective reasoning processes of his mind or even the application of a personal code before they can be interpreted. While such raw notes may be a writing, they are not a report or a statement. See *McGill* v. *United States*, C.A.D.C., No. 14,792, decided August 20, 1959, where the court held that a detective's notes, which he had read to refresh his recollection prior to testifying, were not a statement required to be produced under 18 U.S.C. 3500.

Considered in this light, the decision of the court of appeals here is clearly not in conflict with the decision of the Second Circuit in *National Labor Relations Board* v. *Adhesive Products Corporation*, 258 F. 2d 403 (C.A. 2) (see Pet. 15-17). The Second Circuit held that, since the *Jencks* decision, the trial court does not have discretion to withhold from the defense a *statement* by the witness which relates to the subject matter of his testimony and which he used to refresh his recollection before he testified, even if he did not use it on the stand. Undoubtedly, notwithstanding *Goldman* v. *United States*, such a statement is subject to production under both the *Jencks* decision and the statute, regardless of whether the witness used the statement to refresh his recollection prior to or at the trial, and there is nothing in the opinion below to the contrary. In the present case, petitioner received Rudd's statement in the case report, which is the equivalent of the statement which

the Second Circuit held in the *Adhesive Products* case should have been turned over. The question tendered here as to whether the defense is also entitled, as a matter of right, to notes from which such a statement is compiled, was not before the Second Circuit in that case.[5]

Whatever may be the implications of the *Jencks* decision and statute vis-à-vis *Goldman* in other circumstances,[6] here the Government turned over to the defense the case report of agent Rudd. This report was the statement of the agent to his superiors and was therefore adopted by him. It was a complete and comprehensive statement covering every aspect of the Government's case. The evidence which the Government expected to develop at trial, including that gained through interviews with petitioner and others, was recorded in minute detail.[7] And the report contains internal evidence that it was prepared from the agent's working notes and encompassed the substance of those notes.[8] Nevertheless,

---

[5] Petitioner's position is not substantially enhanced by the fact that agent Rudd used the notes to refresh his recollection before testifying. This fact has no relevance to whether the notes are a report under the *Jencks* decision or a statement under the "Jencks" Act.

[6] As, *e. g.*, where an agent's own notes are the only record in the Government's files of an interview which later became the subject of the agent's testimony.

[7] Significantly, petitioner made no attempt to use the detailed account of Rudd's interview with petitioner or any other part of the report to impeach Rudd's testimony.

[8] The record confirms this internal evidence. Rudd (as well as agent Waters) recounted, as to the question whether petitioner dispensed the drugs in good faith in the course of

petitioner has made a broad demand for all of agent Rudd's notes, including those completely unrelated to the interview between Rudd and petitioner which petitioner now claims is particularly "of vital importance" (Pet. 12). Under these circumstances, especially where petitioner made no request for "specific documents" (cf. *Palermo* v. *United States*, *supra*, 360 U.S. at 345; *Jencks* v. *United States*, *supra*, 353 U.S. at 666-667), the trial court clearly acted within the scope of its proper discretion.

In any event, whether or not the notes were subject to production, the situation here seems parallel to that in *Rosenberg* v. *United States*, 360 U.S. 367, 370-371. There, this Court held that, although a letter signed by the witness should have been turned over to the defendant, the failure to do so was not

---

bona fide treatment, that petitioner readily admitted during the interview, without prompting, that he had written the prescription for "those addicts"—"old opium and heroin and morphine users" (R. 192, 255). The case report recites almost identically that petitioner voluntarily and spontaneously stated that he left prescriptions with "those addicts" and that the addicts had used "opium, heroin, morphine and dilaudid" (p. 18). Similarly, both the testimony and the case report stated that petitioner further said that it was "wonderful" that these persons could by using his prescriptions keep working and not have to go out on the street to buy heroin or a derivative (R. 209, 255; Rept., p. 18). Both recounted petitioner's explanation of the arrangements made for the prescriptions before his departure for Europe (R. 210-211, 255-259; Rept., pp. 18-19) and identically recited many other particulars. Since Rudd testified that prior to the trial he refreshed his recollection from his *notes*, it seems clear that, especially as to the interview with petitioner, the case report is the formal expression and recording of the notes.

prejudicial error since the defense had obtained the same information by other means. Similarly, it can be said here that, since the same information that would have been afforded was already in the possession of the defense (via the case report), the petitioner could not have been prejudiced by his lack of opportunity to inspect the notes.

CONCLUSION

For the reasons stated, we respectfully submit that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

MALCOLM R. WILKEY,
Assistant Attorney General.

BEATRICE ROSENBERG,
JULIA P. COOPER,
Attorneys.

SEPTEMBER 1959.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1959 519682 293

LIBRARY
SUPREME COURT U S

Office Supreme Court, U.S.
FILED
SEP 24 1959
JAMES R. BROWNING, Clerk

SUPREME COURT OF THE UNITED STATES

No. 278

OCTOBER TERM, 1959

HARRY NEEDELMAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

BRIEF OF PETITIONER IN REPLY TO BRIEF FOR THE UNITED STATES

A. C. DRESSLER
1408 Ainsley Building
Miami 32, Florida
Attorney for Petitioner

HILTON R. CARR, JR. &
HERBERT A. WARREN, JR.
1408 Ainsley Building
Miami 32, Florida
Of Counsel for Petitioner

SUBJECT INDEX

ARGUMENT 2

CONCLUSION 5

AUTHORITIES

McGill vs. United States, C.A.D.C. No. 14,792 decided August 20, 1959 2

Palermo vs. United States, 360 U.S. 343 2

Rosenberg vs. United States, 360 U.S. 367 4

FEDERAL STATUTES

18 U.S.C. §3500 2-5

SUPREME COURT OF THE UNITED STATES

No. 278

OCTOBER TERM, 1959

HARRY NEEDELMAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

BRIEF OF PETITIONER IN REPLY TO BRIEF FOR THE UNITED STATES

The Brief of the United States in opposition to the Petition for Certiorari is basically founded upon two arguments:

1. That the original notes of the witness-agent do not constitute a statement as defined in 18 U.S.C. §3500(e).

2. That the substance of the original notes of the witness-agent was made available to the petitioner in the form of the case report.

With reference to the first argument, the United States first argues on page 10 and 11 of its brief that the notes are not a "report", or a "statement". However, on page 12, the United States seems to admit, in footnote 6, that the notes of an agent would be producible if such notes were the only record of an interview. The petitioner submits that the test under 18 U.S.C. §3500 (e) as to whether the notes constitute a "statement" would be the same regardless of whether such notes are the only record or not. 18 U.S.C. §3500(e) requires only a written statement made by the witness and signed or otherwise adopted or approved by him. The notes in the instant case were written by the witness himself and certainly adopted and approved by him when he used such notes to refresh his recollection before testifying. The petitioner submits that the statutory definition of a "statement" is fully met by the notes of the witness-agent.

The United States cites **McGill vs. United States, C.A.D.C. No. 14,792,** decided August 20, 1959 as holding that a detective's notes which he had read to refresh his recollection prior to testifying were not a statement required to be produced under 18 U.S.C. §3500. The Court of Appeals cites as authority for such a holding **Palermo vs. United States, 306 U.S. 343. Palermo vs. United States, supra,** did not cover the situation where a government agent is the witness, but deals with a situation where the witness is the person who was iterviewed by a government agent and the defense is seeking the government's record of such witness' statement to the agent. **Palermo vs. United States, supra,** does not support the holding of the Court of Appeals for the District of Columbia. However, the decision of that Court of Appeals does fully illustrate the necessity of a definitive statement by this

Court as to the law governing the production of notes and memoranda of government agents when such agents take the witness stand.

With reference to the second argument of the United States, the major portion of its brief proceeds upon the unfounded and unwarranted assumption that the substance of the original notes of the agent was made available to the petitioner in the form of a case report. The original notes were never produced, were never examined by the trial Court and were never sealed or made in any way a part of the record in this case. There is no basis whatsoever in the record for the argument of the United States that the substance of the notes was contained in the case report.

The United States, on pages 10 and 11 of its brief, further indulges in the speculation, entirely unsupported by the record, that the notes *may* have recorded events in some unintelligible, abbreviated or symbolic fashion, and that the notes *may* require association with the subjective reasoning processes of the agent's mind before the notes can be interpreted. The need for speculation beyond the realm of the record would not be necessary had the District Court followed the requirement of 18 U.S.C. §3500. For then, the production of the notes would have been required for inspection by the trial judge and, if the trial judge decided that the notes should not be turned over to the petitioner, the notes would have been sealed and made a part of the record and now would be available for inspection by this Court. The fact that the Government must now indulge in surmise and conjecture as to what the notes *may* have contained clearly illustrates the prejudicial effect of the failure of the trial judge to follow the requirements of 18 U.S.C. §3500.

The United States continues its guessing game with the statement, on page 12 of its brief, that the case report (not a part of the record in this case) contains evidence that it was prepared from the agent's notes and encompassed the substance of the notes. It is the purpose of 18 U.S.C. §3500 to remove the decision as to the usefulness of the documents from the control of the prosecution and place such decision in the hands of the trial court, subject to adequate protection of the rights of a defendant by way of review. It is not for the prosecution to decide that the case report encompassed the substance of the original notes. That decision, under the **Jencks** case, is for the defendant; that decision, under 18 U.S.C. §3500, is for the trial court with adequate means for reviewing such decision on appeal.

The United States contends, on pages 13 and 14 of its brief, that the situation in the present case is parallel to that in **Rosenberg vs. U. S., 360 U.S. 367,** wherein the court held that, although a letter signed by a witness should have been turned over to the defendant, the failure to do so was not prejudicial error since the defense had obtained the same information by other means. The petitioner submits that there is a vital difference in the two cases. In **Rosenberg vs. U. S., supra,** the letter in question was produced to the trial judge, withheld from the defendant after examination by the trial judge, was then preserved in the record, and was reviewed by the appellate court. In the present case, the notes in question were not produced, were not inspected by the trial judge and were not preserved in the record to permit review of the trial judge's ruling. The prejudicial effect of the trial court's action is obvious.

The United States concludes its argument with again assuming that the case report contained the same information as the notes of the agent. Such assumption is unfounded and unwarranted and the fact that the Government must resort to assumption illuminates the error made by the trial judge in not making an inspection of the notes and at least causing them to be reserved in the record so as to permit review of the correctness of his ruling.

CONCLUSION

An unfounded assumption by the government that the case report contained the same information as the agent's notes can never be considered a worthwhile substitute for the rights of a defendant under the Sixth Amendment to the Constitution. Nor can such assumption ever take the place of the procedures specified by 18 U.S.C. §3500. The petitioner respectfully submits that the Petition for Certiorari should be granted.

Respectfully submitted,

A. C. Dressler

A. C. DRESSLER
Attorney for Petitioner
1408 Ainsley Building
Miami 32, Florida

HILTON R. CARR, JR. &
HERBERT A. WARREN, JR.
1408 Ainsley Building
Miami 32, Florida
Of Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief of Petitioner in Reply to Brief for the United States was mailed to the Solicitor General, Department of Justice, Washington 25, D. C. this 22nd day of September, 1959 by depositing the same in a United States post office with air mail postage prepaid and addressed to the Solicitor General, Department of Justice, Washington 25, D. C.

I FURTHER CERTIFY that a copy of the foregoing Brief of Petitioner in Reply to Brief for the United States was mailed to the office of James L. Guilmartin, United States Attorney for the Southern District of Florida, Federal Building, Miami, Florida, this 22nd day of September, 1959.

A. C. Dressler

A. C. DRESSLER
Attorney for Petitioner
1408 Ainsley Building
Miami 32, Florida

HILTON R. CARR, JR. &
HERBERT A. WARREN, JR.
1408 Ainsley Building
Miami 32, Florida
Of Counsel for Petitioner

RARY
SUPREME COURT. U. S.

Office-Supreme Court, U.S.
FILED
MAR 4 1960
JAMES R. BROWNING, Clerk

Supreme Court of the United States

No. 278

October Term, 1959

HARRY NEEDELMAN,

Petitioner,

vs.

UNITED STATES OF AMERICA

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF PETITIONER

HILTON R. CARR, JR.,
HERBERT A. WARREN, JR. &
A. C. DRESSLER
1408 Ainsley Building
Miami 32, Florida
Attorneys for Petitioner

SUBJECT INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
QUESTIONS PRESENTED	2-4
STATEMENT OF THE CASE	4-7
SUMMARY OF ARGUMENT	7-8
ARGUMENT	
QUESTION 1.	
1. The specific wording of 18 U.S.C. §3500 encompasses statements of government agents called as witnesses	10-13
2. It was the legislative intent of Congress that 18 U.S.C. §3500 should encompass statements of government agents called as witnesses	13
3. Decisions of Circuit Courts of Appeals in cases decided since Palermo v. United States	14-18
4. 18 U.S.C. §3500 is not restricted to formal statements which would be admissible into evidence	18-20

SUBJECT INDEX (cont.)

	Page
5. The error of the trial court cannot be characterized as harmless error	20-21
QUESTION 2	
1. Jencks v. United States overruled Goldman v. United States	22-23
2. Production of relevant notes or statements of a government witness is a matter of right	23-24
QUESTION 3	
1. Denial by trial court of production without examination of notes sought to be produced denied to petitioner his minimal rights under Sixth Amendment	25-28
CONCLUSION	28
APPENDIX A - 18 U.S.C. §3500	App. 1-3
APPENDIX B - Amendment VI - Constitution of the United States	App. 4

AUTHORITIES

	Page
Bradford v. United States, 9th Cir., 271 F. 2d 58	15, 21, 23
Goldman v. United States, 316 U.S. 129, 62 S. Ct. 993, 86 L. Ed. 1322	22, 24
Holmes v. United States, 4th Cir., 271 F. 2d 635	15, 21
Jencks v. United States, 353 U.S. 657, 77 S. Ct. 1007, 1 L. Ed 2d 1103	22, 24
Johnson v. United States, 10th Cir., 269 F. 2d 72	14
Lev v. United States, 360 U.S. 470, 79 S. Ct. 1431, 3 L. Ed. 2d 1531	11
McGill v. United States, C.A.D.C. 270 F. 2d 329	14
National Labor Relations Board v. Adhesive Products Corporation, 258 F. 2d 403	23
Palermo v. United States, 360 U.S. 343, 79 S. Ct. 1217, 3 L. Ed 2d 1287	12, 13, 19
Rosenberg v. United States, 360 U.S. 367, 79 S. Ct. 1231, 3 L. Ed. 2d 1304	20
Rubin v. United States, 360 U.S. 470, 79 S. Ct. 1431, 3 L. Ed 2d 1531	11
Schneiderman v. United States, 106 F. Supp. 731	26
Wool v. United States, 360 U.S. 470, 79 S. Ct. 1431, 3 L. Ed. 2d 1531	11

AUTHORITIES (cont.)

Page

FEDERAL STATUTES

18 U.S.C. §3500 ..... 10, 11

CONSTITUTIONAL PROVISION

Amendment VI, United States Constitution 26

MISCELLANEOUS

27 Law Week, page 3308 12

Supreme Court of the United States

No. 278

October Term, 1959

HARRY NEEDELMAN,

Petitioner,

vs.

UNITED STATES OF AMERICA

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF PETITIONER

TO THE HONORABLE, THE CHIEF JUSTICE, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

OPINIONS BELOW

The opinion of the Court of Appeals (R-146-153) is reported at 261 F. 2d 802. No written opinion was delivered in the District Court.

JURISDICTION

The judgment of the Court of Appeals was entered on November 14, 1958 (R-153). An Order denying petition for rehearing was entered by the Court of Appeals on July 6, 1959 (R-157). The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. §1254(1). Certiorari was granted by this Court on October 12, 1959 (R-157).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions and statutes involved in this case are as follows:

1. 18 U.S.C. §3500, as set forth hereinafter in Appendix A, page App. 1.

2. The Sixth Amendment to the Constitution of the United States, as set forth hereinafter in Appendix B, page App. 4.

QUESTIONS PRESENTED

1. WHERE A DEFENDANT IN A CRIMINAL PROSECUTION, AT THE BEGINNING OF THE TRIAL AND ALSO WHILE A GOVERNMENT AGENT IS ON THE WITNESS STAND, MOVES FOR THE PRODUCTION AND INSPECTION OF THE NOTES AND MEMORANDA MADE BY SUCH GOVERNMENT AGENT CONTEMPORANEOUSLY WITH HIS INVESTIGATION AND USED BY SUCH GOV-

ERNMENT AGENT BEFORE TESTIFYING, TO REFRESH HIS RECOLLECTION, DOES THE DENIAL BY THE TRIAL COURT OF THE DEFENDANT'S MOTION WITHOUT AN INSPECTION BY THE TRIAL COURT OF SUCH NOTES AND MEMORANDA CONSTITUTE A PREJUDICIAL DENIAL TO DEFENDANT OF THE PROCEDURES PROVIDED FOR IN 18 U.S.C. §3500?

2. WHETHER THE RULE ANNOUNCED BY THIS COURT IN **GOLDMAN V. U. S., 1942, 316 U. S. 129, 132, 62 S. CT. 993, 995, 86 L. ED. 1322**; TO THE EFFECT THAT A TRIAL JUDGE HAS THE DISCRETION TO DENY A DEFENDANT IN A CRIMINAL PROSECUTION THE RIGHT TO INSPECT NOTES AND MEMORANDA MADE BY A GOVERNMENT AGENT DURING HIS INVESTIGATION AND USED BY SUCH GOVERNMENT AGENT TO REFRESH HIS RECOLLECTION BEFORE TESTIFYING AS A WITNESS FOR THE GOVERNMENT, HAS BEEN OVERRULED BY THIS COURT IN **JENCKS V. U. S., 1957, 353 U. S. 657, 77 S. CT. 1007, 1 L. ED. 2d 1103**, and BY THE STATUTE, 18 U.S.C. §3500.

3. WHETHER, WHEN A DEFENDANT IN A CRIMINAL PROSECUTION MOVES, WHILE A GOVERNMENT AGENT IS ON THE WITNESS STAND, FOR THE PRODUCTION AND INSPECTION OF THE NOTES AND MEMORANDA MADE BY SUCH GOVERNMENT AGENT CONTEMPORANEOUSLY WITH HIS

INVESTIGATION AND USED BY SUCH GOVERNMENT AGENT BEFORE TESTIFYING TO REFRESH HIS RECOLLECTION, DOES THE DENIAL BY THE TRIAL COURT OF THE DEFENDANT'S MOTION UPON THE SOLE BASIS THAT SUCH NOTES "MAY" INVOLVE MANY THINGS CONSTITUTE A DENIAL TO THE DEFENDANT OF HIS CONSTITUTIONAL RIGHT TO COMPULSORY PROCESS FOR OBTAINING WITNESSES IN HIS BEHALF UNDER THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, PARTICULARLY WHERE THE TRIAL COURT RECOGNIZES THAT THE GOVERNMENT'S CASE IS A "VERY SLENDER CASE."

STATEMENT OF THE CASE

The petitioner, a physician, and a druggist were first tried on an indictment for conspiracy to violate 26 U.S.C. 4705(a). A mistrial resulted. Subsequently, another indictment was returned against the petitioner alone charging him with substantive violations of 26 U.S.C. 4705(a). (R-2-8). The two cases were consolidated for trial (R-9).

After the mistrial on the conspiracy charge but prior to the consolidated trial the petitioner moved the Court:

> "... for an Order permitting them to inspect the books, papers, documents, memoranda and objects and particularly the contemporaneous notes made by the Government witness, Kenneth Rudd, who had previously testified in said cause

> and who is a material witness for the Government in said cause, made by the said Kenneth Rudd during his investigation and preparation for trial of said cause, and which said contemporaneous notes have already been referred to by the said Rudd in the previous trial of said cause, and by which testimony it was shown that said contemporaneous notes prepared by the said Rudd were of the events, activities related to his said testimony, and that the inspection and copying of said contemporaneous notes made by the said Rudd are material and necessary for the defendants to prepare their defense." (R-8-9).

The motion was granted only to the extent of permitting inspection of any document or material taken from the defendants (R-9). Again, after the narcotic agent, Rudd, had testified at the consolidated trial on direct examination, had been cross-examined by petitioner's counsel and had testified further on re-direct examination by the government, a short recess was had and the Court ruled:

> "I will deny the request for the notes because they may involve many things. You may see the case report." (R-93).

Shortly prior to such ruling by the Court, Agent Rudd had testified on cross-examination as follows: (R-88)

> "Q. You made copious notes, did you not, at the time you started the investigation of this case?
> A. I made several notes, yes, sir.

> Q. And you have refreshed your recollection from the notes that you made, refreshed your memory? Before coming to testify you refreshed your memory by reference to those notes, did you not?
> A. Yes, sir.

The narcotic agent Rudd testified as to conversations with the petitioner wherein the petitioner stated, according to Rudd, that the petitioner knew that certain patients who obtained prescriptions for narcotics were narcotic addicts (R-57). The petitioner denied making any such statements (R-122).

At the close of the government's case a motion for judgment of acquittal was granted as to both defendants on the conspiracy charge (R-11), but petitioner's motion for judgment of acquittal on the substantive charges was denied. At the conclusion of all the evidence the petitioner again moved for judgment of acquittal, which motion was denied by the trial court with the statement:

> "I think this a very slender case, off-hand, but I think there is enough to go to the jury." (R-137-138).

The jury returned a verdict of guilty as to each of the fifteen substantive counts (R-12). The trial court thereafter granted a motion for new trial as to five counts of the indictment and those counts, upon motion of the government, were dismissed by the court (R-15). The court fined the petitioner the total of $5,000 and placed him on probation for three years (R-14-15).

The petitioner filed his notice of appeal from the judgment of conviction in the Court of Appeals for the Fifth Circuit (R-19). On November 14, 1958 the Court of Appeals for the Fifth Circuit affirmed the judgment of conviction (R-153). Circuit Judge Rives wrote the opinion which was concurred in by Circuit Judges Tuttle and Jones (R-146-153). A petition for rehearing was denied on July 6, 1959 (R-154). Certiorari was granted by this Court on October 12, 1959 (R-157).

SUMMARY OF ARGUMENT

Notes made by a government agent during the course of his investigation constitute a "statement" under 18 U.S.C. §3500(e) and, if the agent testifies, must be produced for inspection upon demand of defense counsel. When the government agent testifies, the requirements of 18 U.S.C. §3500 (b) are fulfilled. The requirements of subsection (e) are met in that the notes are written by the agent and constitute his own document, adopted and approved by him.

It was the legislative intent that statements of government agents be covered by 18 U.S.C. §3500. Otherwise, the protections afforded to the government by 18 U.S.C. §3500 would be limited to statements made to government agents, leaving the statements of the agents themselves to be produced without limitation or restriction.

In cases decided by Circuit Courts of Appeals since **Palermo v. United States**, two circuits have denied production of agent's notes upon authority of **Palermo v. United States**. Two other circuits have, however, held such denial to be error, pointing out that nothing in Pa-

lermo v. United States or **18 U.S.C. §3500** suggests that notes of an agent who testifies are not producible.

Formality of the statement and its admissibility into evidence are not determinative of whether such statement is producible under **18 U.S.C. §3500.**

The error of the trial court in the instant case cannot be deemed harmless error. The notes sought to be produced were not examined by the trial court and were not preserved for review. The Court cannot say, as in **Rosenberg v. United States**, that defense counsel was possessed of the same information as he would have been had error not been committed.

Jencks v. United States overruled **Goldman v. United States.** The production of relevant notes of a government agent who testifies is not a matter of discretion with the trial court. The defense is entitled to production of all relevant statements of any government witness. **18 U.S.C. §3500** merely provides a procedure whereby the trial court determines the relevancy of the statement.

The Sixth Amendment has always afforded to defendants the very minimal right to have the trial court inspect the statement sought to be produced and weigh the respective interests of the defendant and the government. This minimal right was denied to petitioner.

ARGUMENT

The decision of the Court of Appeal for the Fifth Circuit in the instant case was:

1. That contemporaneous notes and memoranda prepared by a government agent during the course of his investigation and used by him before testifying to refresh his recollection are not within the scope of **18 U.S.C. §3500.**

2. That the rule of **Goldman v. United States, 316 U.S. 129, 62 S. Ct. 993, 86 L. Ed. 1322,** to the effect that it is discretionary with the trial court to require or not to require a witness to produce contemporaneous memoranda or notes from which he had refreshed his recollection before taking the stand was not overruled by **Jencks v. United States, 353 U.S. 657, 77 S. Ct. 1007, 1 L. Ed. 2d 1103.**

3. That there was no abuse of discretion by the trial court in denying permission to examine such notes and memoranda of the government agent.

QUESTION I

WHERE A DEFENDANT IN A CRIMINAL PROSECUTION, AT THE BEGINNING OF THE TRIAL AND ALSO WHILE A GOVERNMENT AGENT IS ON THE WITNESS STAND, MOVES FOR THE PRODUCTION AND INSPECTION OF THE NOTES AND MEMORANDA MADE BY SUCH GOVERNMENT AGENT CONTEMPORANEOUSLY WITH HIS INVESTIGATION AND USED BY SUCH GOVERNMENT AGENT BEFORE TESTIFYING, TO REFRESH HIS RECOLLECTION, DOES THE DENIAL BY THE TRIAL COURT OF THE DEFENDANT'S MOTION WITHOUT AN INSPECTION BY THE TRIAL COURT OF

SUCH NOTES AND MEMORANDA CONSTITUTE A PREJUDICIAL DENIAL TO DEFENDANT OF THE PROCEDURES PROVIDED FOR IN 18 USC §3500?

The Court of Appeals for the Fifth Circuit has decided in the instant case that contemporaneous notes and memoranda made by a government agent during the course of his investigation and used by him to refresh his recollection before testifying are not within the scope of **18 U.S.C. §3500.** The petitioner respectfully submits that such decision is manifestly contrary to the specific wording and intent of **18 U.S.C. §3500.**

1. The specific wording of 18 U.S.C. §3500 encompasses statements of Government agents called as witnesses.

Sub-section (a), **18 U.S.C. §3500** deals solely with statements made by a government witness to a government agent, which situation is not present in the case at bar. However, sub-section (b) of **18 U.S.C. §3500,** does cover the situation of the case at bar, that is, where the government agent is the witness who is testifying. Subsection (b) provides:

> "(b) After a witness, called by the United States, has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. . . ."

The government Agent, Rudd, was called as a witness by the United States in the instant case. He had testified on direct, cross, and re-direct when the trial judge denied petitioner's request for production of his contemporaneous notes and memoranda. The only remaining question is whether the notes and memoranda of Rudd constituted a "statement" under the definition contained in sub-section (e) of **18 U.S.C. §3500.** Sub-section (e) of 18 U.S.C. §3500 provides:

> "(e) The term 'statement' . . . means (1) a written statement made by said witness and signed or otherwise adopted or approved by him."

The notes and memoranda of Rudd met all the requirements of sub-section (e) (1). The notes were written, were made by the witness, and were further adopted or approved by him by the very act of using such notes to refresh his recollection before testifying concerning the events which he recorded in his notes. The petitioner submits that the notes and memoranda of Rudd met every requirement of **18 U.S.C. §3500** and that the determination by the Court of Appeals that such notes are not within the scope of **18 U.S.C. §3500** cannot be upheld.

The production of notes of a government agent in a situation similar to the case at bar was discussed during oral arguments before this Court in the case of **Lev v. United States. Wool v. United States, and Rubin v. United States, 360 U.S. 470, 79 S.Ct. 1431, 3 L.Ed. 2d 1531.** A portion of the discussion between various members of this Court and Mr. Oscar Davis, First Assistant to the Solicitor General, as reported in 27 Law Week at page 3308, was as follows:

"In many instances, the Assistant to the Solicitor General continued, the face of the document shows it is not producible. There may be a three-hour interview with a fifty-line summary.

"Mr. Justice Brennan: 'Suppose here there had been a statement "I talked with Carlin, but he denied knowledge of this transaction," and subsequently the witness testified. Would that be producible?'"

"Mr. Davis: 'No.'

"Mr. Davis asserted that counsel could cross-examine the witness as to what he said or cross-examine the agent.

"Mr. Justice Black: 'Suppose the agent denies it?'

"Mr. Davis: **'Then the memoranda could be produced, since it was the agent's own document and would be producible.'"** (emphasis added)

The statement made by the First Assistant to the Solicitor General is precisely the contention of the petitioner. In the case at bar the memoranda was the agent Rudd's own document and was producible. Rudd prepared the memoranda. Rudd used the memoranda to refresh his recollection. It was his own document and could properly be used to impeach his testimony. The letter, as well as the intent, of **18 U.S.C. §3500** requires production of such memoranda. In argument upon **Palermo v. United States, 360 U.S. 343, 79 S. Ct. 1217, 3 L. Ed. 2d 1287,** government

counsel again suggested the remedy of calling the interviewing agent, apparently as a means of obtaining production of the agent's memoranda of an interview with a witness (see footnote (1) to the concurring opinion of Mr. Justice Brennan). The petitioner cannot improve upon the clarity and brevity of the statement attributed to Mr. Davis, " . . . it was the agent's own document and would be producible."

2. It was the legislative intent of Congress that 18 U.S.C. §3500 should encompass statements of government agents called as witnesses.

It cannot be argued that **18 U.S.C. §3500** is to be limited solely to statements made by government witnesses to government agents and excludes from its scope the prior statements of government agents who testify as witnesses. As this Court pointed out in **Palermo v. United States, supra,**

> "The Act's major concern is with limiting and regulating defense access to government papers. . ." (360 U.S. at 354)

To say that the act limits and regulates defense access to government papers where statements to government agents are concerned but places no limitations or regulations where the statements of government agents themselves are concerned is to restrict the act in manner obviously not within the intention of Congress. The petitioner submits that there can be no doubt but that statements of government agents who testify as witnesses are within the specific wording, as well as the legislative intention, of **18 U.S.C. §3500.**

3. Decisions of Circuit Courts of Appeals in cases decided since Palermo v. United States.

Since the filing of the petition for certiorari in this case, the question of the production of memoranda and reports of government agents who testify as government witnesses has been considered by four Courts of Appeals.

In **Johnson v. United States, 10th Cir., 269 F. 2d 72,** the defendant complained that the trial court refused to require the government to produce a memorandum prepared by a special agent who testified as a witness. This witness testified that he made no notes at the time of the first interview with the defendant; that after the first interview and before the second, he prepared a memorandum which related to the interview; that he prepared a written statement to be signed by the defendant and which was signed by the defendant at the second interview; that the memoranda contained some statements made by the defendant which were not in the written statement. The Court of Appeals for the Tenth Circuit held that the memorandum prepared by the witness was his interpretations and impressions, and thus not a statement within the intendment and meaning of **18 U.S.C. §3500. Palermo v. United States** was cited as authority for such holding.

In **McGill v. United States, C.A.D.C. 270 F. 2d 329,** the defendant sought production of the notes of a police officer, which notes were made on the case by the police officer and used by him to refresh his recollection prior to coming to court. The trial court ruled that if the officer referred to the notes on the witness stand, counsel

would be entitled to look at the notes, but that counsel could not require production of the notes if the witness simply used the notes to refresh his recollection before coming to court. The Court of Appeals affirmed, stating that 18 U.S.C. §3500 governed and that the notes demanded were not required to be produced under the terms of the statute. **Palermo v. United States** was cited as authority for such decision.

In **Bradford v. United States, 9th Cir., 271 F. 2d 58,** production was sought of the notes of a government agent who testified as a witness. The notes were made by the agent during the course of investigation and used by the agent to refresh his recollection before testifying. The trial court examined the notes *in camera* and determined that no inconsistencies existed between the notes and the testimony of the witness. The notes were returned to the witness and not preserved for appellate review. The action of the trial court was taken before the decision in **Jencks v. United States, 353 U.S. 657, 775. Ct. 1007, 1L. Ed. 2d of 103.** The Court of Appeals, applying the **Jencks** case and not the statute, held the trial court to be in error in denying the defendant the right to inspect the notes and ordered a new trial. The Court of Appeals noted that on a retrial the procedures set out in 18 U.S.C. §3500 would be followed.

In **Holmes v. United States, 4th Cir., 271 F. 2d 635,** one of the principal witnesses for the government was an F.B.I. agent who testified at length about his investigation and conversations he had with the defendants. The defense demanded production of the memoranda and reports of the agent. The prosecution claimed that the files contained irrelevant matter which should not be

disclosed. The file was tendered to the trial judge so that he might excise the irrelevant portions. The trial judge declined to read the reports and, instead, the F.B.I. agents themselves extracted certain portions which were delivered to the defense. The Court of Appeals reversed the conviction of the defendant holding that 18 U.S.C. §3500 places upon the trial judge the affirmative duty of inspecting *in camera* a statement which the prosecution contends contains unrelated matter and that the court, itself, excise the unrelated matter. The Government contended that the Jencks Act (18 U.S.C. §3500) does not apply to statements prepared by a government agent who becomes a witness at the trial. The Court of Appeals ruled:

(1) The rule of the **Jencks** case would require that all of the F.B.I. files be delivered to defense counsel for determination as to the portions wished to be used in cross-examination.

(2) The secrecy of confidential unrelated material in the file can be protected by applying the procedures of the Act.

(3) Nothing in the Jencks Act suggests that defense counsel are entitled to no statements of the witness, simply because he happens to be an F.B.I. agent.

(4) The use of an agent's memoranda and reports to contradict the agent who prepared the same in no way contravenes the policy of the Act against the use of an investigator's notes or summaries to contradict his informer.

(5) Nothing in **Palermo v. United States, supra,** suggests that a summary made by an agent would not be a "statement" within the meaning of subsection (e) of the Act when its use is sought to cross-examine the agent who prepared it.

(6) Inasmuch as the trial court did not examine the file to determine what was withheld, it could not be said that all relevant material was delivered to defense counsel and therefore the error could not be characterized as harmless error.

The petitioner submits that the decisions of the Court of Appeals for the Ninth Circuit in **Bradford v. United States, supra,** and of the Court of Appeals for the Fourth Circuit in **Holmes v. United States, supra,** correctly interpret the holding and spirit of **Jencks v. United States** as well as the letter and purpose of **18 U.S.C. §3500. Jencks v. United States** makes it clear that once a government witness takes the stand, be he agent or not, his reports, statements, memoranda and all documents of which he is the author are producible if relevant to his testimony. The statute merely provides a procedure whereby the government may obtain an *in camera* determination, and excision, by the court of the irrelevant portions.

The petitioner respectfully submits that the interpretation of **Palermo v. United States** by the Court of Appeals for the Tenth Circuit in **Johnson v. United States, supra,** was erroneous, as was the interpretation by the Court of Appeals for the District of Columbia in **McGill v. United States, supra. Palermo v. United States** did not involve a case where the agent who prepared the memorandum was the witness, as was the case in **Johnson v.**

United States. Likewise, **Palermo v. United States** did not pass upon a situation such as presented in **McGill v. United States** and there is nothing in **Palermo** which even suggests that the notes of a police officer would not be a "statement" of such police officer when its use is sought in order to cross-examine such police officer. **Palermo** holds simply that only those statements which could properly be called the witness' own words should be made available to the defense for the purposes of impeachment. By the same reasoning, if the statement can properly be called the witness' own words, it is producible.

4. 18 U.S.C. §3500 is not restricted to formal statements which would be admissible in evidence.

The Court of Appeals for the Fifth Circuit, in the instant case, placed a highly restrictive interpretation upon **18 U.S.C. §3500.** The court, in deciding that notes and memoranda prepared by a government agent contemporaneously with his investigation and used by him to refresh his recollection before testifying are not within the scope of **18 U.S.C. §3500,** predicated its decision upon two premises, both of which premises this Court rejected in **Palermo v. United States, supra.** The Court of Appeals determined that the notes of Rudd were not within **18 U.S.C. §3500** because:

(1) **18 U.S.C. §3500** relates to formal written statements or reports made by the witness and signed or otherwise adopted or approved by him, and,

(2) such memoranda or notes could not be directly introduced for impeachment purposes, but might be used as a basis for cross-examining the witness.

The **formality** of a written statement is no criteria of whether it should be produced under **18 U.S.C. §3500. As** stated by this Court in **Palermo v. United States, supra:**

> "We find the legislative history persuasive that the statute was meant to encompass more than mere automatic reproductions of oral statements."

Thus, the restriction by the Court of Appeals of 18 **U.S.C. §3500** to **formal** written statements is not in accord with the decision of this Court in **Palermo v. United States, supra.**

Likewise, the admissibility in evidence of a statement sought to be produced is of no importance in determining whether the statement should be produced under 18 U.S.C. §3500. As stated by Mr. Justice Frankfurter in **Palermo v. United States, supra:**

> "The statute governs the production of documents; it does not purport to affect or modify the rules of evidence regarding admissibility and use of statements once produced."

And, as stated by Mr. Justice Brennan in **Palermo v. United States, supra:**

> "The statute is to be given a reasonable construction, and the courts must not lose sight of the fact that the statute regulates **production** of material for possible use in cross examination, and does not regulate **admissibility** into evidence —as the Court properly observes."

It is the belief of the Petitioner that it is abundantly clear that the trial court was in error in not requiring the production of the notes of the witness Rudd. The relevancy of the notes was already established by the testimony of Rudd. The potential aid of the notes in effective cross-examination was enhanced by the fact that Rudd had used such notes to refresh his recollection. The only remaining question is whether the error of the district court in denying production of the notes was prejudicial and requires the granting of a new trial.

5. The error of the trial court cannot be characterized as harmless error.

In **Rosenberg v. United States, 360 U.S. 367, 79 S. Ct. 1231, 3 L. Ed. 2d 1304,** this Court held that the error of the trial court in refusing production of a particular letter was harmless error when the very same information was possessed by defendant's counsel as would have been available were error not committed. In **Rosenberg v. United States, supra,** the letter which was sought to be produced was retained as part of the record so that it could be examined by the appellate court. In the instant case the notes of the agent Rudd were not retained as part of the record. It is impossible to state that defense counsel was possessed of the same information as he would have been had error not been committed in the present case for the simple reason that it is impossible to know what was contained in the notes of Rudd.

In **Bradford v. United States, supra,** the Court of Appeals for the Ninth Circuit was presented with a situation similar to the case at bar in that the notes involved were not preserved in the record to permit review. The court stated, on page 69 of its opinion,

> "We, unlike the Supreme Court in Rosenberg, do not have the notes before us, and are unable to characterize the error as harmless."

In **Holmes v. United States, supra,** the Court of Appeals for the Sixth Circuit likewise pointed out that, unlike the situation in **Rosenberg v. United States, supra,** the Court was unable to characterize the error as harmless. The Court stated:

> "Here it is not contended that the defense had the information contained in the portion of the file which was not produced. It cannot be said all the relevant and related material was delivered to defense counsel, for the district court never examined it to determine what was withheld."

In the case at bar the district court never examined the notes to determine what was withheld or to determine if the information contained in the notes was the same information as provided to the petitioner in the case report. The trial court predicated its denial of production solely upon the basis that the notes "may" involve many things. The notes not having been preserved in the record, it is impossible to characterize the error of the district court as harmless.

QUESTION 2

WHETHER THE RULE ANNOUNCED BY THIS COURT IN **GOLDMAN V. U. S., 1942, 316 U.S. 129, 132, 62 S. Ct. 993, 995, 86 L. Ed. 1322,** TO THE EFFECT THAT A TRIAL JUDGE

HAS THE DISCRETION TO DENY A DEFENDANT IN A CRIMINAL PROSECUTION THE RIGHT TO INSPECT NOTES AND MEMORANDA MADE BY A GOVERNMENT AGENT DURING HIS INVESTIGATION AND USED BY SUCH GOVERNMENT AGENT TO REFRESH HIS RECOLLECTION BEFORE TESTIFYING AS A WITNESS FOR THE GOVERNMENT, HAS BEEN OVERRULED BY THIS COURT IN **JENCKS V. U. S., 1957, 353 U.S. 657, 77 C. Ct. 1007, 1 L. Ed. 2d 1103,** and BY THE STATUTES, **18 U.S.C. §3500.**

The Court of Appeals for the Fifth Circuit ruled in the instant case that the case of **Goldman v. United States, 316 U.S. 129, 62 S. Ct. 993, 86 L. Ed. 1322,** was not overruled by **Jencks v. United States, 353 U.S. 657, 77 S. Ct. 1007, 1 L. Ed. 2d 1103,** and that, therefore, it was discretionary with the trial court to require or not to require a witness to produce memoranda or notes from which he had refreshed his recollection before taking the stand.

1. Jencks v. United States overruled Goldman v. United States.

In **Goldman v. United States, supra,** this court ruled that it was discretionary with the trial court to require or not to require a witness to produce memoranda or notes from which he had refreshed his recollection before taking the stand. In **Jencks v. United States, supra,** this court, on page 68 of the opinion, states the holding of **Goldman v. United States, supra,** and then states,

"We now hold that the petitioner was entitled to

> an order directing the government to produce for inspection all reports of Matusow and Ford in its possession, written and, when orally made, as recorded by the F.B.I. touching the events and activities as to which they testified at the trial."

Subsequent decisions by Circuit Courts of Appeal have taken the position that the rule of **Goldman v. United States was overruled** by **Jencks v. United States.** In **National Labor Relations Board v. Adhesive Products Corporation, 2nd Cir. 258 F. 2d 403,** the Circuit Court considered the question as to whether a statement admittedly used by a witness to refresh his recollection shortly prior to testifying at an administrative hearing must be produced on demand by counsel for the purpose of cross-examination. The Court of Appeals for the Second Circuit, after discussing **Goldman v. United States, supra,** ruled that under **Jencks v. United States, supra,** such statement must be produced.

In **Bradford v. United States, Ninth Circuit, 271 F. 2d 58,** defense counsel sought production of notes of the government agent who was testifying, which notes had been used to refresh his recollection before taking the stand. The Circuit Court applied the **Jencks** case in reaching its decision that the trial court was in error in not requiring production of the notes in question.

2. Production of relevant notes or statements of a government witness is a matter of right.

The fact that the notes of the government witness are used by him to refresh his recollection before taking

the stand is not of primary importance in determining whether such notes must be produced. The governing consideration is whether the notes are relevant to the witness' testimony. The petitioner submits that under **Jencks v. United States** a defendant is entitled to production of any notes or statements of a government witness which are relevant to that witness' testimony. The use or non-use by the witness of such notes or statements to refresh his memory does not affect the producibility of such notes. **Jencks v. United States** enunciates the right of the defendant to such production. 18 U.S.C. §3500 does not curtail such right but only provides the procedural machinery by which the defendant is provided with only that to which he is entitled. **Jencks v. United States**, not **Goldman v. United States**, governs the right of the petitioner to production of the notes. 18 U.S.C. §3500, not **Goldman v. United States**, governs the procedural effectuation of such rights. There is no longer any discretion on the part of the trial judge to deny production if the statement of the witness meets the requirements of **Jencks v. United States** and 18 U.S.C. §3500. Production is a matter of right, not of discretion. The function of the trial judge is to exercise the affirmative duty of determining the relevancy of the statement, if the government protests that the statement contains irrelevant portions. This determination of relevancy is subject to review. There is no discretion to withhold relevant statements.

The petitioner submits that the Circuit Court of Appeals for the Fifth Circuit was in error in the instant case in ruling that **Goldman v. United States** stated the applicable rule of law governing the production of the agent's notes.

QUESTION 3

WHETHER, WHEN A DEFENDANT IN A CRIMINAL PROSECUTION MOVES, WHILE A GOVERNMENT AGENT IS ON THE WITNESS STAND, FOR THE PRODUCTION AND INSPECTION OF THE NOTES AND MEMORANDA MADE BY SUCH GOVERNMENT AGENT CONTEMPORANEOUSLY WITH HIS INVESTIGATION AND USED BY SUCH GOVERNMENT AGENT BEFORE TESTIFYING TO REFRESH HIS RECOLLECTION, DOES THE DENIAL BY THE TRIAL COURT OF THE DEFENDANT'S MOTION UPON THE SOLE BASIS THAT SUCH NOTES "MAY" INVOLVE MANY THINGS CONSTITUTE A DENIAL TO THE DEFENDANT OF HIS CONSTITUTIONAL RIGHT TO COMPULSORY PROCESS FOR OBTAINING WITNESSES IN HIS BEHALF UNDER THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, PARTICULARLY WHERE THE TRIAL COURT RECOGNIZES THAT THE GOVERNMENT'S CASE IS A "VERY SLENDER CASE."

1. Denial by trial court of production without examination of notes sought to be produced denied to petitioner his minimal rights under the Sixth Amendment.

The trial court denied the motion of the petitioner for production of notes and memoranda made by a government agent during the course of his investigation and used by him to refresh his recollection before testifying.

without any examination by the trial court of the notes and memoranda and solely "because they may involve many things." The Court of Appeals, in ruling that such action by the trial court did not constitute an abuse of discretion, sanctioned a departure from the accepted and usual course of judicial proceedings which endangers the constitutional rights of all defendants in criminal cases.

As stated in United States v. Schneiderman, 106 F. Supp. 731, 735, 736:

> "The court's discretionary power to compel production of a document must be exercised in the light of the requirement of the 6th Amendment that:
>
> 'In all criminal prosecutions, the accused shall enjoy the right. . . to have compulsory process for obtaining witnesses in his favor. . . .' (U. S. Const., Amend. VI). . .
>
> "Proper exercise of judicial discretion in determining whether to compel production requires in every case that any public policy militating against public disclosure of the document be weighed against the interests of the accused in having the document for use in making a defense to the charge."

In exercising their discretionary power in the past, the courts adopted the procedure of an *in camera* inspection of the documents in order to weigh public policy against the interests of the accused (see cases cited in **Jencks v. United States, supra,** at page 676, footnote 4). This procedure was disapproved in **Jencks v. United States, supra.**

The statute, 18 U.S.C. §3500 provided a method for the excising by the trial court of portions of a document which the trial court feels should not be revealed to the defendant. In any event, the courts have even been diligent to preserve constitutional rights of defendants under the Sixth Amendment and to deny production of relevant documents to them only where the possible evidentiary value of the document to the defendant was outweighed by some public policy against disclosure. The discretion exercised by the courts was the discretion of deciding, **after examining the document**, whether the interests of the defendant or the public were paramount.

It is the position of the petitioner that the notes in question are within the scope of 18 U.S.C. §3500 and that, if the government contended that the notes contained irrelevant matter, the procedure therein prescribed should have been followed. But 18 U.S.C. §3500 is at most a procedural method for protecting the interests of the government without infringing the constitutional rights of defendants under the Sixth Amendment. The trial court in the instant case not only did not follow the statutory procedures of 18 U.S.C. §3500 but also denied to the petitioner the minimal right which has always been accorded under the Sixth Amendment; that is, the right to have the trial court, at the very least, order production of the notes for examination by the trial court in order that the trial court might weigh the evidentiary value of the document as against reasons for not disclosing the document in the interests of the public welfare or safety.

The petitioner respectfully submits that the opinion of the Court of Appeals in the instant case cannot be permitted to remain on the law books as precedent for

such a denial to a defendant of all rights under the Sixth Amendment.

CONCLUSION

A defendant is entitled to have produced for his inspection all notes, memoranda and statements of any government witness who takes the stand against him, if such are relevant to the testimony of the witness. If the government contends that such statements contain irrelevant matter, the provisions of 18 U.S.C. §3500 are activated and the trial judge then has the affirmative duty of examining the statement in question and excising the irrelevant portions. The petitioner was entitled to production of the notes of agent Rudd prepared during his investigation. Production was denied by the trial court upon the basis that the notes "may" involve many things. Such action of the trial court cannot be sustained under the ruling of **Jencks v. United States**, nor the provisions of 18 U.S.C. §3500. The error in this case, recognized to be a weak case by the trial court, cannot be characterized as harmless.

The petitioner respectfully submits that the decision of the Circuit Court of Appeal for the Fifth Circuit should be reversed with directions that the cause be remanded to the District Court for a new trial.

Respectfully submitted,

HILTON R. CARR, JR.
HERBERT A. WARREN, JR.
A. C. DRESSLER
1408 Ainsley Building
Miami 32, Florida
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that 5 copies of the foregoing Brief of Petitioner were mailed to the Solicitor General, Department of Justice, Washington 25, D. C. this 2 day of March, 1960 by depositing the same in a United States post office with air mail postage prepaid and addressed to the Solicitor General, Department of Justice, Washington 25, D. C.

HILTON R. CARR, JR.
HERBERT A. WARREN, JR.
A. C. DRESSLER
1408 Ainsley Building
Miami 32, Florida
Attorneys for Petitioner

BY Herbert A. Warren Jr.

APPENDIX A

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

18 U.S.C. §3500. Demands for production of statements and reports of witnesses.

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the Court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the Court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not

relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

APPENDIX B

CONSTITUTION OF THE UNITED STATES AMENDMENT VI — JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

LIBRARY

Supreme Court, U.S.
FILED
APR 4 1980

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	3
Summary of argument	11
Argument	17
I. The personal notes of a government agent which are not communicated to anyone are not within the reach of 18 U.S.C. 3500 and therefore are not subject to production under that statute	18
II. Petitioner was not entitled as a matter of right to inspect Agent Rudd's notes under any other rule of inspection	31
III. Even if it be assumed *arguendo* that Rudd's notes were subject to production, failure to order their production did not constitute reversible error	36
Conclusion	39

CITATIONS

Cases:	
Badon v. *United States*, 269 F. 2d 75	27
Bradford v. *United States*, 271 F. 2d 58	27
Clancy v. *United States*, C. A. 7; No. 12, 815, decided March 24, 1960	20, 27
Goldman v. *United States*, 316 U.S. 129	15, 16, 17, 32, 33, 34
Gordon v. *United States*, 344 U.S. 414	23
Holmes v. *United States*, 271 F. 2d 635	26, 28
Jencks v. *United States*, 353 U.S. 657	11, 13, 15, 16, 18, 22, 23, 29, 32, 33
Johnson v. *United States*, 269 F. 2d 72	20, 27
Lambert v. *United States*, 261 F. 2d 799	35, 36
Lennon v. *United States*, 20 F. 2d 490	32
Lev v. *United States*, 360 U. S. 470	20
Little v. *United States*, 93 F. 2d 401, certiorari denied, 303 U.S. 644	32

545267—60——1

Cases—Continued

	Page
McGill v. *United States*, 270 F. 2d 329, certiorari denied, February 29, 1960, No. 324 misc., this term	28
National Labor Relations Board v. *Adhesive Products Corporation*, 258 F. 2d 403	29
Palermo v. *United States*, 360 U.S. 343	12, 19, 20, 34, 35
Rodgers v. *United States*, 267 F. 2d 79	27
Rosenberg v. *United States*, 360 U.S. 367	17, 38
Short v. *United States*, 271 F. 2d 73, certiorari denied, 361 U.S. 948	26
Stanley v. *United States*, 249 F. 2d 64	28
Tillman v. *United States*, 268 F. 2d 422	27
United States v. *David*, 168 F. Supp. 269, affirmed, 264 F. 2d 248, certiorari denied, 359 U.S. 967	26
United States v. *De Lucia*, 262 F. 2d 610, certiorari denied, 359 U.S. 1000	26
United States v. *Franklin*, 170 F. Supp. 503	20
United States v. *Moia*, 251 F. 2d 255	20
United States v. *O'Connor*, 273 F. 2d 358	26
United States v. *Papworth*, 156 F. Supp. 842, affirmed, 256 F. 2d 125, certiorari denied, 358 U.S. 854	27–28
United States v. *Prince*, 264 F. 2d 850	26
United States v. *Socony Vacuum Oil Co.*, 310 U.S. 150	32
United States v. *Soto*, 256 F. 2d 729	26
Williamson v. *United States*, 272 F. 2d 495	26
Statutes:	
18 U.S.C. 3500	2, 11, 12, 13, 14, 15, 16, 18, 19, 20, 21, 29, 31, 33, 34
26 U.S.C. 4705(a)	3
Miscellaneous:	
103 Cong. Rec. 15928	14, 25
103 Cong. Rec. 16114, 16119–16120, 16127–16128	24
103 Cong. Rec. 16125	24
103 Cong. Rec. 16129	24
103 Cong. Rec. 16738	14, 23
H. R. 7915, 85th Cong., 1st sess.	2
H. Rept. No. 700, 85th Cong. 1st Sess. p. 2	22
H. Rept. No. 1271, 85th Cong. 1st Sess. p. 3	13–14, 23
S. Rept. No. 569, 85th Cong. 1st Sess. p. 2	22
S. Rept. No. 981, 85th Cong. 1st Sess. p. 3	22

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 278

HARRY NEEDELMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (R. 146–153) is reported at 261 F. 2d 802.

JURISDICTION

The judgment of the court of appeals was entered on November 14, 1958 (R. 153). A petition for rehearing was denied on July 6, 1959 (R. 157). The petition for a writ of certiorari was filed on August 4, 1959, and granted on October 12, 1959, 361 U.S. 808 (R. 157). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

her a government agent's notes of an inter-
made part of government files or communi-
nyone, fall within the reach of 18 U.S.C.

her the trial judge, in his discretion in the
ces of this case, could properly deny pro-
the notes as papers used to refresh the
collection before trial.
her the denial of the request for production
licial where the substance of the notes was
lable through the agent's statement in the
, prepared from the notes, which was given
nse,

STATUTE INVOLVED

J.S.C. 3500 provides:
a) In any criminal prosecution brought by
United States, no statement or report in
possession of the United States which was
le by a Government witness or prospective
ernment witness (other than the defendant)
an agent of the Government shall be the
ject of subpena, discovery, or inspection
il said witness has testified on direct exam-
tion in the trial of the case.
b) After a witness called by the United
ites has testified on direct examination, the
rt shall, on motion of the defendant, order
United States to produce any statement
hereinafter defined) of the witness in the
session of the United States which relates
the subject matter as to which the witness
testified. If the entire contents of any such

statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

* * * * * *

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

STATEMENT

On October 18, 1955, an indictment was returned in the United States District Court for the Southern District of Florida charging that petitioner and one Waxman conspired to sell narcotic drugs, not pursuant to written orders, in violation of 26 U.S.C. 4705(a) (R. 1). Proceedings on this charge terminated in a mistrial (R. 147). On October 2, 1957, a second indictment was filed against petitioner alone charging him with 15 substantive violations (in August 1955) of 26 U.S.C. 4705(a) (R. 2–8).

On the government's motion these two indictments were consolidated for trial (R. 9–10), and on November 19, 1957, the jury found petitioner guilty on each

of the fifteen substantive counts (R. 12).[1] The trial court then granted petitioner's motion for a new trial on counts 11 through 15 (R. 12–14), and upon the government's motion dismissed these counts (R. 15–16, 18).

On counts 1 through 10, petitioner was sentenced to pay a fine totalling $5,000 ($500 on each count), and to two years' imprisonment on each count, to run concurrently. The sentence of imprisonment was suspended and petitioner was placed on probation for three years (R. 14–15; 16–18).

The court of appeals unanimously affirmed, finding: (1) that the evidence supported the jury verdict, and (2) that the trial judge committed no error in denying petitioner's demand for production of the personally-prepared "work notes" of narcotic agent Rudd who was a government witness.

1. The pertinent evidence may be summarized as follows:

Shortly before departing for a seven-week European vacation on August 6, 1955 (R. 102–103), petitioner, a licensed physician practicing in Miami Beach, Florida, left more than 130 signed prescriptions for codeine, methadon and demerol (all narcotic drugs (R. 10–11)), to be delivered during his absence to some seven persons, including Miller, Garcia, and Buonauto, the three persons named as the purchasers in the substantive indictment. Some of these prescriptions were left by petitioner in his office, and

[1] On November 18, 1957, after the conclusion of the government's case, the trial court granted defendants' motion for a judgment of acquittal on the conspiracy charge (R. 11).

others (for one Abe Bruches and his wife (R. 36–37, 69, 76)) were left in the Medical Arts Pharmacy, the drugstore owned by petitioner's co-defendant (Waxman). Misses Rossman and Fredericks, petitioner's office assistants during this period (named but not indicted as co-conspirators under the conspiracy charge), testified to the arrangements made by petitioner for the delivery of, and payment for, these narcotics prescriptions during his absence and the procedures that they followed pursuant to his directions. Before he left, petitioner had instructed them that all the narcotics prescriptions were to be kept locked in a desk drawer, and that a prescription was to be delivered to the person in whose name it was issued when that person came in and paid a prescribed fee of $5 or $10. Each time one of these prescriptions was delivered, the office assistants were to, and did, write in the date of delivery next to the words "to be filled"—words previously written on the prescriptions by Miss Rossman (R. 23–26, 30–33). The fees received were entered in the "day book" and locked in the desk drawer (R. 24).

Miss Rossman, who identified some fifty-six prescriptions as containing her handwriting (R. 21, 26), further testified that, when she delivered a prescription during petitioner's absence, the recipient would not necessarily see or have any conversation with anyone else in the office and that the normal office procedure was "done away' with." Hence, if these persons come in solely for prescriptions, no treatment cards were pulled nor were they sent in to the doctor who was taking care of petitioner's practice during

his absence; they would see only her (R. 25, 27). Miss Fredericks, who identified some twenty-nine prescriptions (R. 31), similarly stated that when Fidel Garcia came in for a prescription during this period he would not, on most occasions, talk to a doctor, but only to her (R. 32).[4]

Two pharmacists (Miss Sachs and Mr. Komisarow)[5] testified concerning the 70-odd narcotic prescriptions deposited by petitioner at the Medical Arts Pharmacy for Abe Bruches and his wife (R. 34, 36–37, 151–152). Their testimony was that these prescriptions were kept in a safe (R. 37); and were dated and filled in by a pharmacist when the Bruches came in and requested them (R. 35–37, 40–49, 52–53). The Bruches would come in on the average of once a day for the prescribed drugs (R. 50). Miss Sachs further testified that the Bruches paid her $2 for the pills and that the money was placed in a separate envelope in the safe (R. 37–38). Mr. Komisarow stated that the Bruches paid a "fee for the prescription itself," and at different times left money at the drug store which, as he understood, was to pay off a past debt to petitioner (R. 41). When petitioner returned from his vacation,

[4] Since Dr. Szekely, who was to take over petitioner's practice during his vacation, had not received his state license to practice at the time of petitioner's departure, petitioner arranged that Dr. Grier (a licensed physician with a government narcotic license) also be in the office. Dr. Szekely obtained his license two weeks after petitioner had left, and thereafter ran the practice alone until petitioner's return (R. 30, 70–78, 104–106, 108). Neither Dr. Grier nor Dr. Szekely were called as witnesses.

[5] They were also named but not indicted as co-conspirators (R. 1).

he picked up the unfilled prescriptions from the drugstore (R. 49), and also collected $175 left there for him by the Bruches (R. 65–66, 98).

On September 22, 1955, two federal narcotic agents, Rudd and Waters, interviewed petitioner at his office, after procuring the prescriptions from the drug stores at which they had been filled. They testified that, upon being shown some of these prescriptions, petitioner readily admitted that he had prepared them for "those addicts" (R. 57, 97). Petitioner termed these people "old opium and heroin and morphine users" (R. 57). According to Agent Rudd, petitioner admitted that, just before he left for Europe in August 1955, he had written out these prescriptions and left them with his office girl with instructions to collect $5 or $10 for each prescription[4] (R. 56, 66–67, 69). Rudd further testified that petitioner told him that some of these people had been cured of the narcotic habit (R. 67); that, except for the Bruches, he did not think that, if withdrawn from narcotics properly, any of them would suffer ill effects other than normal withdrawal symptoms, and could be cured; that he had spoken to them about a supervised cure, but that they could not go to Lexington Hospital because of their jobs (R. 67–68). Petitioner further remarked that he thought it "wonderful" that, by

[4] As for the Bruches' prescriptions left at the drugstore, the fee was $2.50 each (R. 67–69). The reason given by petitioner why the Bruches' prescriptions were left there rather than at his office was that they would be accessible even if his office was closed (R. 69, 98). Petitioner also told Agent Rudd that the $175 collected by petitioner from the drugstore represented payment from the Bruches for these prescriptions (R. 65–66, 98).

using methadon, these persons could keep working and not have to go out on the streets to buy heroin, morphine, or a derivative. He admitted that methadon was a narcotic drug, but said it was less habit-forming than morphine and that by furnishing it he believed that he was shortening the recipient's addiction to drugs (R. 68). He said that one tablet of methadon was equivalent to "one shot" of narcotics, and that he prescribed twenty-four tablets on one prescription, "[b]ecause they told [him] they needed it" (R. 68).

Agent Waters' testimony corroborated in detail what petitioner had said to Agent Rudd at this interview (R. 97–98, 99–100). Both agents further testified that, at a subsequent interview, petitioner identified police file photographs of some of those for whom he had prescribed narcotics (R. 73). All persons receiving prescriptions, except one, were familiar to Agent Rudd in connection with his official duties (R. 79, 83–85).

Petitioner testified that the narcotics were prescribed in the course of his professional treatment of the persons receiving them (R. 106–108); that he never told his office assistants what fees to collect for the prescriptions (R. 105, 136); and that he had told Agent Rudd that these persons were not addicts (R. 122–124). He denied having any knowledge that any of these persons had ever been involved in narcotic violations (R. 126).

2. On October 17, 1957, about a month before the consolidated trial, petitioner and co-defendant Waxman joined in a motion for production and inspection of the "books, papers, documents, memoranda and

objects and particularly the contemporaneous notes made by the Government witness, Kenneth Rudd, who has previously testified * * * during his investigation and preparation for trial * * *." The motion averred that Rudd's testimony at the prior trial on the conspiracy indictment revealed that such contemporaneous notes were of events and activities related to his testimony and that inspection was necessary for preparation of the defense (R. 8–9). The motion was granted to the limited extent of allowing production of any documents or other material taken from either defendant (R. 9–10).

At the consolidated trial, on cross-examination of Agent Rudd, the following colloquy occurred between the agent and petitioner's counsel (R. 88):

> Q. You made copious notes, did you not, at the time you started the investigation of this case?
>
> A. I made several notes, yes, sir.
>
> Q. And you have refreshed your recollection from the notes that you made, refreshed your memory? Before coming to testify you refreshed your memory by reference to those notes, did you not?
>
> A. Yes, sir.

During a short recess following redirect examination of Agent Rudd, there was apparently a conversation, which is not reported, between counsel and the trial judge out of the presence of the jury. At the conclusion of the recess, but before the return of the jury, the trial judge said (R. 93):

> I will deny the request for the notes, because they may involve many things. You may see the case report.

We are advised by the United States Attorney (and petitioner does not contend the contrary) that an undeleted copy of the complete case report was handed over to petitioner's counsel. That portion which details what Agent Rudd would himself testify as to his interviews with petitioner is reproduced in full in the record at R. 138–146. The full report is signed by both Agents Rudd and Waters, and is dated October 31, 1955 (R. 138–146),* some six weeks after the agents began their active investigation of the case on September 21, 1955. It covers every aspect of the government's case including a narrative statement, a list of exhibits, and a list of prospective witnesses and their anticipated testimony.

As to Agent Rudd's prospective testimony, the report states, *inter alia,* that, when Rudd showed petitioner certain of the prescriptions, petitioner "voluntarily and spontaneously stated that he had left those prescriptions with 'those addicts' when he left for Europe. That they were all addicts and had used opium, heroin, morphine and dilaudid, that he gave it to them to keep them comfortable, and so that they could keep going and stay on their jobs and so that they would not go out on the streets looking for heroin or dilaudid" (R. 139–140). The report further states that petitioner told Rudd that he prescribed "Methadon because it would hold them

* A copy of the complete case report is on file with the Clerk of this Court.

comfortable and was the least addicting of narcotic drugs * * * [and] it was wonderful that 'those addicts' * * * were only taking Methadon and not using any heroin or dilaudid at exorbitant prices" (R. 140, 142–143). The report also recites that petitioner had said that he had discussed with the addicts the possibility of a cure at Lexington Hospital, but that they could not or would not go since they worked for a living. It also states that petitioner admitted to Rudd that he arranged to leave prescriptions with instructions as to fees at his office and at Waxman's pharmacy (R. 140–142).

SUMMARY OF ARGUMENT

I

Under 18 U.S.C. 3500(b), *supra*, pp. 2–3, after a witness has testified for the United States, the court must, on motion of the defendant, order that a "statement" of the witness relating to the subject matter of his direct testimony, in the possession of the United States, be produced for the defendant's inspection. Subsection (e) defines the term "statement" to include: (1) a written statement, "signed or otherwise adopted or approved" by the witness, or (2) a recording or transcription of a "substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement."

The wording of 18 U.S.C. 3500 and its enactment after this Court's decision in *Jencks* v. *United States*, 353 U.S. 657, evidence that Congress intended to fashion rules of production only with respect to documents dealing with communications from a govern-

ment witness to a government agent. If there is such a communication, the statute determines whether the document is producible or not; if there is none, the statute does not come into play. Given the existence of a communication, the document is producible only if it satisfies either of the definitions of "statement" contained in 18 U.S.C. 3500(e) (1) and (2). The purpose of these definitions is to make sure that only documents which are fairly attributable to the witness-communicant and not the agent-interviewer are turned over to the defense. If the document satisfies neither of these specified tests (but is, for example, merely a summary of what the witness said to the agent), the statute excludes it from production. See *Palermo* v. *United States*, 360 U.S. 343, 352.

The question here is whether to apply the statute to the situation where the witness for the United States is not a stranger, but an investigating agent himself. Although some courts have held that no documents emanating from a government agent—be they personal notes, investigative reports, or any other type of document—are dealt with by 18 U.S.C. 3500, we do not take that position. In our view, when an agent makes a report to his superiors or fellow agents of what he sees or hears, he makes a communication to an agent of the government, and his recital is within the reach of 18 U.S.C. 3500 if he becomes a government witness. By this same test, however, since personal work notes, retained by the agent himself, are not a *communication* to anyone, it is our position that they are not within the language or rationale of 18 U.S.C. 3500 and they are not required to be produced by that statute.

A. The language of 18 U.S.C. 3500 shows that Congress was dealing only with *communications* by the witness *to* the government. Subsection (a) prohibits pre-trial discovery of a statement or report "in the possession of the United States" made by a prospective government witness "to an agent of the Government." Subsection (b) speaks of production of any statement "in the possession of the United States." And subsection (e)(2) deals with "an oral statement made by said witness *to an agent of the Government*". (Emphasis added.) Undoubtedly, personal notes taken by an agent-witness are his own, and in that sense satisfy one of the objectives of the statute as being properly attributable to the witness. But since they are not communicated to anyone, the notes are not within the class of documents dealt with by the statute. The statute is concerned only with the communicated statement, report, or information.

B. The background and legislative history of 18 U.S.C. 3500 support this interpretation. In *Jencks* v. *United States,* 353 U.S. 657, the Court held that oral and written reports communicated by government witnesses to government agents, which related to their direct testimony, were subject to inspection regardless of whether the reports were inconsistent with the witnesses' trial testimony. In implementing and defining the limits of the *Jencks* principle, Congress was functioning within this same context—the production or non-production of communicated information from government witnesses to government agents. The Conference Report on the final draft of the bill italicized this requirement of communication

(H. Rept. No. 1271, 85th Cong., 1st Sess., p. 3). Congressman Celler, Chairman of the Judiciary Committee and one of the Managers on the Part of the House, plainly announced this view in final debate (103 Cong. Rec. 16738), and Senator O'Mahoney, sponsor of the legislation in the Senate so agreed in earlier debate (103 Cong. Rec. 15928).

In short, the background, language, and crucial legislative history of 18 U.S.C. 3500 show that Congress sought to govern the production of those documents which involve or refer to communications from a government witness to a government agent. It did not intend to formulate rules of inspection as to all kinds of physical documents or materials in all possible situations, including personal notes of government witnesses not communicated to the government.

C. We do not contend that, because the government witness in this case was also the government agent, all documents attributable to him are exempt from the operation of the statute. In fact, the communicated case report, containing Agent Rudd's statement of the case to his superiors, was turned over to the defense. We believe that those reports of interviews or investigations properly attributable to an agent-witness and forwarded to his superiors or colleagues, if they relate to his direct testimony, are producible under subsection (e)(1) of 18 U.S.C. 3500. We do not challenge those recent decisions holding that *communicated* reports of an agent-witness are producible under the statute. We say only that personal notes, retained by the agent and not communicated, are not within the reach of the statute where they are sought

in connection with the testimony of the agent-witness himself.

D. There is sound reason for the Congressional decision to treat uncommunicated personal notes as different from transmitted material. The highly personalized nature of note-taking, which commonly utilizes special symbols, "key words" and other private references, though tied to the subjective mental processes of the note-taker, will often be incomprehensible to a stranger. This is not to suggest that hardship in deciphering the meaning of a document would necessarily determine whether it was producible under the statute or not. It does suggest, however, that when the note-taker-witness has not indicated his belief that his notes are intelligible to others by communicating them to others for their perusal and use, they do not rise to the level of "statements" within the coverage of the statute, even though transmitted notes would be producible as of right under the statute.

II

On cross-examination of Agent Rudd, it was shown that, before trial, he had referred to his notes in order to refresh his recollection. The use of the notes in this manner brings into this case the question of whether the notes were producible as material utilized by a witness to refresh his recollection—even though they were not producible as of right under 18 U.S.C. 3500.

Until *Jencks* v. *United States,* 353 U.S. 657, it was thought settled in *Goldman* v. *United States,* 316 U.S. 129, 132, that, as to material used to refresh recollec-

ore trial, inspection was a matter of discre-
h the trial judge. Undeniably, in the circum-
dealt with by *Jencks*, now governed by the
ıre of 18 U.S.C. 3500—requiring certain ma-
to be produced as of right—the *Goldman* rule
cretion no longer exists. However, we do not
that the rule of discretion for materials used
resh recollection was undermined by *Jencks*, or
U.S.C. 3500, where the document sought is not
cible under the statute as of right.

his view, the court below (which rejected the
nt that the statute governed production of
Rudd's notes) applied the *Goldman* doctrine,
l that there was no abuse of discretion since
ıse had been allowed to examine the complete
port. Considered in this light—as a matter of
tion—the court of appeals was correct in up-
ıg the trial court's refusal to turn over the notes
s case.

III

uming *arguendo* that Agent Rudd's notes should
been turned over to the defense, failure to order
production was harmless error. The complete
report, including what Agent Rudd would him-
testify, was turned over to the defense. And an
ination of that report reveals that it was pre-
d with the aid of his notes and encompasses their
ıtial substance. The report is almost identical
ssential respects with Agent Rudd's direct testi-
y concerning his interview with petitioner. Since
d testified that he had refreshed his recollection
ı these notes, it seems clear that his statement in

the case report is the formal expression and recording of the notes.

This case is therefore within the rationale of *Rosenberg* v. *United States,* 360 U.S. 367, where it was held that the failure to turn over to the defense the statement of the witness was not prejudicial error since the defense had obtained the same information by other means. The situation here is comparable since the defense was in possession of the complete case report, containing the same information now sought; petitioner could not have been prejudiced by the refusal to allow him to inspect the work notes.

ARGUMENT

After Agent Rudd had testified as a witness for the government, his entire case report, including his report of his interview with petitioner, was turned over to the defense (*supra,* p. 10). The papers which were not ordered produced were the personal working notes of the agent, which had not been communicated to other agents or to Rudd's superiors as his "statement" of the case. The question here is whether petitioner was entitled as of right to production of those notes. It is our position, discussed in Point I, that such uncommunicated work notes are not a "statement" of the witness under 18 U.S.C. 3500 and therefore are not subject to production under the statute. In Point II, we show that, since they were used to refresh the recollection of the witness before trial, the production of the notes was within the discretion of the trial judge under *Goldman* v. *United States,* 316 U.S. 129, and that the refusal to order their production in this case

was not an abuse of discretion in view of the fact that the full case report was turned over to the defense. In Point III, we show that in the light of the turning over of the case report, non-production of the notes, even if it was error, was not prejudicial and does not call for a new trial.

I. The personal notes of a government agent which are not communicated to anyone are not within the reach of 18 U.S.C. 3500 and therefore are not subject to production under that statute

18 U.S.C. 3500(b), *supra*, pp. 2–3, provides that, after a witness called by the United States has testified on direct examination, the court must, on motion of the defendant, direct that there be turned over to the defendant "any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified." The term "statement" is defined in subsection (e) as a written statement "signed, or otherwise adopted or approved" by the witness, or a recording or transcription of a "substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement."

It is evident both from the wording of the statute and its enactment after the decision of this Court in *Jencks* v. *United States*, 353 U.S. 657, that Congress was thinking primarily of the situation where the witness for the United States is someone other than a government investigator who has, during the course of investigation, made statements to a government investigator which are part of the government files. In

that situation, it is the record of the witness' communication to the agent that the defense is seeking to inspect. Unless there is such a communication, there is no record of it and therefore no document the defense could inspect. In other words, only when there is some communicated utterance of a prospective government witness to a government agent does the statute come into play. Given the existence of such a document (one which purports to deal with a communication from a government witness to a government agent), the inquiry is whether the document is fairly ascribable to the witness-communicant, or to the agent-interviewer. To decide this, the statute establishes two tests: (1) if the document is signed, adopted or otherwise approved by the witness, it is producible as his "statement" under 18 U.S.C. 3500(e)(1), and (2) if not so approved or adopted, it is nonetheless rendered producible by subsection (e)(2), if shown to be a substantially verbatim contemporaneous recordation of the witness' oral communication to the agent. If the record of the communication fits neither of these definitions, however, but is only a summary of what the witness told the agent it is excluded from inspection. It was the intention of Congress that the witness should be impeached only by a recording of the communication which could be said accurately to reflect his own language. *Palmero* v. *United States*, 360 U.S. 343, 352.

The problem here is how to apply the words and spirit of the statute to the situation where the witness for the United States is not a stranger, but the investigating agent himself. In that case it could be

said that there could be no statement of "a government witness * * * *made to an agent of the Government*" (emphasis added), since the government witness is the government agent; he is the recipient, not the donor, of recorded information. For this reason it might be argued, and some courts appear to have held, that documents emanating from the agent—whether they be notes, reports, or any other type of document—are freed from production by 18 U.S.C. 3500.*

We do not take that position. As indicated at the oral argument of *Palermo, supra,* and *Lev* v. *United States,* 360 U.S. 470, we think that, insofar as a government agent-witness makes a report of what he sees and hears, he does make a communication to an agent of the government (his superiors or colleagues within the government), and that such a report falls within the language and rationale of 18 U.S.C. 3500. Personal notes for one's own use, however, are not a communication to anyone. It is our view that such uncommunicated work-notes are not within either the letter or purpose of the production requirements of 18 U.S.C. 3500. Our view, in short, is that production of such notes cannot be demanded as of right. Both the language and the legislative history of 18 U.S.C. 3500 show that it deals only with information *communicated* by the witness.

A. The language of the statute as a whole and in detail shows that it was dealing with a record of

---

* See *Clancy* v. *United States,* C.A. 7, No. 12,815, decided March 24, 1960; *Johnson* v. *United States,* 269 F. 2d 72, 74 (C.A. 10); *United States* v. *Franklin,* 170 F. Supp. 503, 506 (N.D. Ohio); cf. *United States* v. *Moia,* 251 F. 2d 255, 257 (C.A. 2).

information which had been communicated by the witness to the government. Thus, subsection (a) prohibits pretrial discovery of a statement or report "in the possession of the United States" which was made by a prospective government witness "to an agent of the Government." Similarly, subsection (b) speaks of production of any statement "in the possession of the United States." And the definition of "statement" in subsection (e)(2), dealing with recordings and transcriptions of oral statements, refers to "an oral statement made by said witness *to an agent of the Government*" (emphasis added).

Petitioner places his emphasis (Pet. Br. 10–13) on the definition in subsection (e)(1) that "statement" includes a "written statement made by said witness and signed or otherwise adopted or approved by him". Rather than supporting petitioner's view, we think that provision strengthens ours. Its critical requirement is that the witness, by some affirmative act on his part, acknowledge to another his responsibility for the document.[7] While the primary reason for requiring such formal approval is to make sure that what is produced is the witness' own declaration, we think the language is also indicative of the general statutory scheme that, in order to be a statement governed by the statute, the document must purport to be a communication of the witness to another. Significantly, the subsection does not include a document merely because it is in the witness' own handwriting (as are

[7] There is no doubt that personal notes retained by a witness for the government who is not a government employee would *not* be producible under 18 U.S.C. 3500.

personal notes), but requires that it be *signed* or otherwise *adopted* or *approved* by him. A person does not normally sign or otherwise adopt or approve his own working notes when he makes them for his own personal perusal and use. He merely writes down some observations. Only when the notes are prepared or expanded for transmittal or publication to another is there any reason for such acknowledgement of authorship. No doubt, the notes are the agent's own, and in that sense they meet one of the objectives of the statute, as being attributable to the witness. But they do not fall within the class of documents which the statute embraces because they are not an utterance communicated to anyone; it is with the *communicated* utterance that the statute is concerned. As we discuss *infra*, pp. 29–31, personal notes made at an interview for the purpose of preparing a report do not have the authority of a communicated statement such as the statute envisages.

B. The general background and legislative history of 18 U.S.C. 3500 support this interpretation. The avowed purpose of the statute was to set definite guide lines for the trial courts in implementing the basic holding in *Jencks* v. *United States*, 353 U.S. 657, by a precise clarification of the appropriate reach of that decision. See, *e.g.*, S. Rept. No. 569, 85th Cong. 1st Sess. p. 2; S. Rept. No. 981, 85th Cong. 1st Sess. p. 3; H. Rept. No. 700, 85th Cong. 1st Sess. p. 2. In *Jencks*, this Court decided that oral and written reports communicated by government witnesses Ford and Matusow to the Federal Bureau of Investigation which related to the subject matter of their direct

testimony were to be turned over to the defense irrespective of whether the reports contained material inconsistent with the witnesses' trial testimony. The Court was thus dealing solely with the question of the production of statements, whether written or oral, made by government witnesses to government agents.* In implementing and defining the limits of the *Jencks* rule, Congress was acting within this general area.

This is borne out by the Conference Report on the final draft of the bill, in which the Managers on the Part of the House deemed it necessary to italicize this requirement of communication to an agent. As they said (H. Rept. No. 1271, 85th Cong. 1st Sess. p. 3):

> The changes agreed upon by the conferees * * * (2) limit the types of statements and reports which come under the provisions of the bill to statements of Government witnesses or prospective witnesses, other than the defendant, *made to an agent of the Government* * * * [emphasis in original].

Favorably discussing this report, Congressman Celler, Chairman of the Judiciary Committee and one of the Managers on the Part of the House, observed that the Act limited itself to statements "of Government witnesses or prospective Government witnesses *made to agents of the Government* and no other kinds of statements, documents, and so forth" (103 Cong. Rec. 16738, emphasis added). His remarks in this

* Similarily, *Gordon* v. *United States*, 344 U.S. 414, referred to approvingly in *Jencks* (353 U.S. at 666–667), dealt also with the production of a statement made by a government witness to a government agent.

connection are particularly significant since in earlier debate he had sought to amend the House bill (H.R. 7915) because of his belief that its language could be interpreted as covering the subject of the production of all documents attributable in some way to the witness, and that while statements made by prospective government witnesses to agents of the government would be producible, if truly attributable to the witness, all other documents connected with the witness would be excluded from production altogether by the bill, whether communicated to the government or not.* In accord with his understanding, he sought to broaden the area of production under the statute by additionally permitting production, in the court's discretion, of all "books, records, papers, or documents" relied upon by the witness as a record of his past recollection, or as a means to refresh his recollection (103 Cong. Rec. 16125). While his amendment was defeated (*id.* at 16129), the provision of the House bill that Congressman Celler found offensive was deleted in Conference. It was because the Conference bill excised the offending passage and made plain that the Act applied to statements or what purported to be statements of government witnesses to government agents, and did not deal with other documents con-

*He so interpreted paragraph (a) of that bill which provided that: "In any criminal prosecution brought by the United States, any rule of court or procedure to the contrary notwithstanding, no statement or report of any prospective witness or person other than a defendant which is in the possession of the United States shall be the subject of subpena, discovery, or inspection, except as provided in paragraph (b) of this section." See his comments at 103 Cong. Rec. 16114, 16119-16120, 16127-16128.

nected with the witness, that Congressman Celler relented in his objections and recommended its passage. Indeed, such limited coverage was the original understanding of Senator O'Mahoney, sponsor of the legislation in the Senate, who in earlier debate had observed: "[W]e are dealing with one character of statements, and one character only, namely, statements made by Government witnesses who have been called and who have testified before the court, *who have made statements to a Government agent.* That is all." (103 Cong. Rec. 15928; emphasis added).

For present purposes, the crux of the background, language, and legislative history of 18 U.S.C. 3500 is that Congress aimed to govern the subject of the production of those documents which purport to record or deal with communications from a government witness to a government agent. If examination of the document reveals that it is properly attributable to the witness, the statute renders that part of it which relates to the witness' direct testimony producible; if it proves instead not to be properly attributable to the witness (*e.g.*, a summary containing the impressions and interpretations of the interviewer), then the statute renders it non-producible. Congress did not further intend to establish rules of inspection in all possible situations as to all kinds of documents connected with witnesses, even government witnesses. Since personal, non-communicated notes have not been communicated to the government, their production is not required as of right under the statute.[10]

[10] Whether production was required under any other principle of law is discussed, *infra*, pp. 31*ff*.

C. As noted at the outset, we are not contending, as petitioner seems to assume (Pet. Br. 14–21), that because the government witness in this case was also a government agent all documents which the agent prepared relating to his direct testimony were immune from the operation of the statute. On the contrary, the government turned over to the defense the case report of Agent Rudd, which contained his statement of the case transmitted to his superiors (*supra*, p. 10). We believe that, just as in the case of any other government witness, those reports of interviews or investigations prepared or otherwise approved by an agent-witness and transmitted for the information and perusal of his superiors or colleagues, which relate to his direct testimony, are his "statement" and are subject to production under subsection (e)(1). Consequently, we have no quarrel with cases like *Holmes* v. *United States*, 271 F. 2d 635, 637 (C.A. 4), holding that "memoranda" and "reports" of an agent-witness concerning his investigation of the case and his conversations with the defendant about which he testified at trial were producible as his statement under 18 U.S.C. 3500, or with other recent decisions to the effect that communicated reports or memoranda of an agent-witness are producible under the statute.[11] We think there is

[11] See, *e.g.*, *United States* v. *O'Connor*, 273 F. 2d 358, 360–361 (C.A. 2); *Short* v. *United States*, 271 F. 2d 73, 76–77 (C.A. 9), certiorari denied, 361 U.S. 948; *United States* v. *Prince*, 264 F. 2d 850, 851–852 (C.A. 3); *United States* v. *De Lucia*, 262 F. 2d 610, 614, certiorari denied, 359 U.S. 1000; *United States* v. *Soto*, 256 F. 2d 729, 734–735 (C.A. 7); cf. *Williamson* v. *United States*, 272 F. 2d 495, 498 (C.A. 5); *United States* v. *David*, 168

a meaningful distinction between documents prepared for communication, or communicated, by the agent-witness (memoranda and reports compiled for the examination of his superiors and colleagues), and personal non-transmitted notes written by the agent for his private use as a tool to aid his memory.[12]

Nor do we have any quarrel with the rationale of *United States* v. *Papworth*, 156 F. Supp. 842, 853–

F. Supp. 269, 271 (N.D. Ohio), affirmed, 264 F. 2d 248 (C.A. 6), certiorari denied, 359 U.S. 967.

[12] There are divergent views in some recent cases on this point. The Fifth Circuit, on facts similar to those in the instant case, sustained the view that non-transmitted personal notes of an agent-witness are not within the reach of 18 U.S.C. 3500. *Tillman* v. *United States*, 268 F. 2d 422, 424–426. See also *Badon* v. *United States*, 269 F. 2d 75, 80–83 (C.A. 5). On the other hand, in *Bradford* v. *United States*, 271 F. 2d 58, 65–69 (C.A. 9), during a pre-*Jencks* trial, the trial court, after *in camera* inspection, refused to turn over to the defense formal reports of the agent-witness, as well as the agent's private notes, on the ground that these documents contained nothing inconsistent with his direct testimony. In reversing, the Ninth Circuit did not inquire whether the notes were communications properly to be classified with the agent's formal reports of the case, but, broadly applying the *Jencks* decision, lumped all the documents under one heading and remanded the case for a new trial at which the procedures of 18 U.S.C. 3500 were to apply. See, also, *Rodgers* v. *United States*, 267 F. 2d 79, 89–91 (C.A. 9). Since, in each of these cases, the agent-witness had referred to his notes in order to refresh his recollection, as we discuss *infra* pp. 31*ff*, the question of production actually turned on different considerations from those dealt with by the courts.

At the other end of the spectrum, is *Johnson* v. *United States*, 269 F. 2d 72, 74, where the Tenth Circuit held that even a formal memorandum transmitted by the agent-witness as his report of the case was not a producible statement within the statute, but rather the agent's "interpretations and impressions" of what the defendant told him. See also *Clancy* v. *United States*, C.A. 7, No. 12,815, decided March 21, 1960.

854 (N.D. Tex.), affirmed, 256 F. 2d 125 (C.A. 5), certiorari denied, 358 U.S. 854, where, after an *in camera* inspection, the trial court held that if a non-witness agent made contemporaneous substantially verbatim notes of an interview with the government witness, such notes were producible under the statute as the statement *of the witness,* for there the notes were *not* ordered produced as the statement *of the agent,* but rather as a full and accurate record of information communicated to the agent by the government witness. Cf. *Holmes* v. *United States,* 271 F. 2d 635, 638 (C.A. 4). Similarly, we do not read the opinion in *McGill* v. *United States,* 270 F. 2d 329 (C.A. D.C.), certiorari denied on other issues, February 29, 1960, No. 324 Misc., this Term, as holding that the production of notes sought as the statement of the agent-witness is governed by 18 U.S.C. 3500 and excluded from production by that statute. Rather, as we understand that case, where the agent testified on cross-examination that he had taken notes of his conversations with *other government witnesses,* the court of appeals considered that the demand for the notes was predicated on the theory that the notes were the "statements" of these *other witnesses* and not sought as the statement of the agent herself. Proceeding under that hypothesis, the court was correct in ruling that these communications were within the reach of the statute and not producible because not fairly attributible to those witnesses.[13] Cf. *Stanley* v. *United States,* 249 F. 2d 64, 66 (C.A. 6).

[13] In the petition for certiorari, there was no challenge made to the production ruling.

Nor, again, do we find inconsistent with our position the basic holding of the Second Circuit in *National Labor Relations Board* v. *Adhesive Products Corporation,* 258 F. 2d 403, also relied upon by petitioner (Pet. Br. 23). In that case, the court held that, under the *Jencks* decision, the trial tribunal had no discretion to withhold from the defense a communication by the witness to the government which related to the subject matter of his direct testimony and which he had used to refresh his recollection before he testified, even though he did not refer to it while on the stand. There can be no doubt that, irrespective of whether the witness had referred to this document to refresh his recollection or not, since it was his "statement" it would be producible under the *Jencks* decision and now under 18 U.S.C. 3500. And, as we discuss *infra,* pp. 31*ff*, in such circumstances, it would make no difference on the issue of production whether the witness had referred to this type of document to refresh his recollection or not.

D. The short of our position is that where the government agent-witness, in interviewing the defendant or conducting his investigation, takes notes for his own personal use and does not transmit those notes to his superiors or fellow agents as his report (or part of his report)—which is the situation in the present case—such notes are not within 18 U.S.C. 3500, and not producible thereunder when the agent takes the stand. There is a sound basis for Congress' having treated such uncommunicated personal notes as in a different category from statements or reports communicated by the agent-witness for the use or information of others.

is common knowledge that note-taking for the ses of personal recollection is a highly indi- stic matter substantially affected by the habits, ular practice, intellect, and psychological up of the note-taker. It is usual for the writer ploy symbols, special abbreviations, "key words," other private references which, while tied to his ctive thought processes and helpful in aiding him call past events, will often be incomprehensible stranger. For some note-takers, one word or bol may serve to recall a whole sequence of ideas; others, personal notes may approach a complete t-hand record. Some notes seek to cover, by word ymbol, everything that the note-taker wishes to mber; others jot down only selected items, leaving heir memory to recall the rest.

do not mean to suggest that difficulty in de- ering the meaning of a document would neces- determine whether it is producible under the te or not. We do think, however, that only when ote-taker-witness has indicated that his personal s are intelligible to others by conveying the notes to rs for their information or use—thus suggesting in themselves the notes have meaning for others, sufficiently reveal what he wishes to convey so they should be read"—should notes be held within tatute, whether or not made by a federal agent- s. It is only then that the notes take on the char- of "statements" intended to be understood and

e at a trial of uncommunicated personal notes, for pur- of cross-examination, is apt to involve time-consuming rial-confusing difficulties of collateral investigatio. nto eaning of the notes, the witness' note-taking habits, etc.

relied upon by others. Personal notes made by a government witness not employed by the government would clearly not be producible under the statute if not communicated or conveyed to the government (*supra*, pp. 20–22); the uncommunicated personal notes of a government agent-witness are in the same class of private memory-joggers intended for the individual use of the person.[15]

II. Petitioner was not entitled as a matter of right to inspect Agent Rudd's notes under any other rule of inspection

It was brought out during the cross-examination of Agent Rudd that before trial he had referred to his notes in order to refresh his recollection (R. 88). As we have discussed in Point I, *supra*, that fact has no relevance on the question of whether petitioner had a right of inspection pursuant to 18 U.S.C. 3500. If notes relating to his direct testimony had been transmitted by Rudd to his superiors, then they would have been producible under 18 U.S.C. 3500(e)(1), regardless of whether he had ever looked at them again. Conversely, that he had looked at them before his trial testimony does not bring them within the reach of the statute absent the essential requirement of communication and transmittal (see *supra*, pp. 18–31). However, the use of notes by the agent-witness for recollection purposes does inject into the case the issue of whether the notes were producible under an entirely different doctrine of inspection, *i.e.*, whether the notes should have been produced under the special rule deal-

[15] Normally, such uncommunicated notes do not become part of government files and may be disposed of at will by the government employee.

ing with material used by a witness to refresh his recollection.

Until *Jencks* v. *United States,* 353 U.S. 657, the general federal rule where a witness had, before trial, refreshed his recollection by reference to notes or memoranda was thought settled by this Court's decision in *Goldman* v. *United States,* 316 U.S. 129. As there announced (p. 132):

> We think it the better rule that where a witness does not use his notes or memoranda in court, a party has no absolute right to have them produced and to inspect them. Where, as here, they are not only the witness' notes but are also part of the Government's files, a large discretion must be allowed the trial judge. We are unwilling to hold that the discretion was abused in this case.

See, also *United States* v. *Socony Vacuum Oil Co.,* 310 U.S. 150, 232–234.[16]

---

[16] In *Lennon* v. *United States,* 20 F. 2d 490, 493–494 (C.A. 8), the rationale of the rule was explained thus:

"* * * This right is accorded [inspection of any paper or memorandum used by a witness while on the stand], in order that [the cross-examiner] may ascertain whether the paper or memorandum used has any legitimate tendency to bring the fact in controversy to the mind of the witness, and in order that he may be in a position to cross-examine as to the testimony given and thereby to test the candor and integrity of the witness * * *.

"But in this case * * * [t]he paper was not used while the witness was on the stand * * *. Witnesses frequently refresh their memories before going into court, by referring to papers in their possession which are not taken into court; and where they rely on their recollection of the facts, * * * it is not necessary that the writing be produced."

See, also, *Little* v. *United States,* 93 F. 2d 401, 406–407 (C.A. 8), certiorari denied, 303 U.S. 644.

In *Jencks*, this Court stated (353 U.S. at 668):

> This Court held in *Goldman* v. *United States*, 316 U.S. 129, 132, that the trial judge had discretion to deny inspection when the witness "* * * does not use his notes or memoranda [relating to his testimony] in court * * *" We now hold that the petitioner was entitled to an order directing the Government to produce for inspection all reports of Matusow and Ford in its possession, written and, when orally made, as recorded by the F.B.I., touching the events and activities as to which they testified at the trial.

In his dissent in *Jencks* (353 U.S. at 680), Mr. Justice Clark observed that *Goldman* was "*contra* to the rule announced today." Mr. Justice Burton, concurring with the Court (353 U.S. at 672, 674–675), also stated his belief that *Goldman* could not be squared with the majority rule in *Jencks*.

There is no doubt that in the circumstances dealt with in *Jencks* (the production of a statement made by a prospective government witness to agents of the government)—now governed by the procedure adopted in 18 U.S.C. 3500—the *Goldman* rule no longer has any vitality. As pointed out above, regardless of whether the witness examines his statement before he testifies or not, if it is a statement under 18 U.S.C. 3500 it is subject to production as of right. However, we do not believe that the rule of discretion announced in *Goldman for materials used to refresh recollection* was undermined by *Jencks*, or 18 U.S.C. 3500, where the document sought is not one producible

under the statute. Recollection may be refreshed by all sorts of documents, not necessarily made by (or properly attributable to) the witness himself and not necessarily communicated to the government. Where production is sought on the basis that the witness actually used it to refresh his recollection, the rule of discretion announced in *Goldman* still has force and effect for a document outside the scope of Section 3500.

To make our point more graphically, let us assume a criminal case where, before trial, the government witness had examined a photograph taken by another in order to refresh his recollection. The photograph is clearly not a statement of the witness under 18 U.S.C. 3500. And if, upon cross-examination, the defense sought to examine the photograph, its producibility would not in our view depend upon whether it fits the definitions of 18 U.S.C. 3500. If the statute alone governs, there would be an unyielding rule precluding the photograph's production in all instances, for if it is not a statement of the witness (yet its producibility is governed only by the statute) it would be excluded from production altogether (see *Palermo* v. *United States*, 360 U.S. 343, 350–351) even though used by the witness, on the stand or before testifying, to refresh his recollection.

We believe that the proper approach in such circumstances is to recognize that 18 U.S.C. 3500 has nothing to do with the question of the production of such a photograph—or other materials outside the scope of 18 U.S.C. 3500—used to refresh recollection, and that the problem of whether the defense should be

entitled to see it or not rests within the sound discretion of the trial judge under the rationale of *Goldman*.[17] In *Lambert* v. *United States*, 261 F. 2d 799 (C.A. 5), this rationale was applied in deciding the question of the production of an F.B.I. report not prepared by the witness (a city detective), but used by him (before taking the stand) to refresh his recollection of the events. The court stated (p. 802):

> The statute passed to meet the Jencks decision, 18 U.S.C.A. § 3500, confines the right to inspect statements or reports in the possession of the United States to those which were made by a Government witness. In the present case, appellant's counsel sought to examine the full F.B.I. report made by Agent Bush, and not joined in by the witness, City Detective Richmond.

Because the detective had used the report, the court then applied the rationale of discretion announced in *Goldman* (p. 802):

> The Goldman case was not overruled in Jencks * * *. We are unwilling to hold that the discretion of the district court was abused in this case.

On this same view, the court below rejected in this case the contention that the statute governed produc-

[17] Of course, the argument we are making applies to materials *used to refresh recollection* and *not* to documents, not producible under 18 U.S.C. 3500, which have not been so used to refresh recollection. As *Palermo* holds, the latter materials are not producible at all, and the judge has no discretion to order their production.

tion of Agent Rudd's notes, but found that the *Goldman* rule applied and held that there was no abuse of discretion in the trial court's refusal to order the notes produced since the defense had been permitted to inspect the full case report containing Agent Rudd's complete statement of his interview with petitioner (R. 138–146). 261 F. 2d at 806–807. Considered in this light—as a question of discretion for the trial judge—the court of appeals was correct in upholding the trial court's ruling. Agent Rudd did not use the notes in court. The testimony of Agent Waters regarding the substance of Rudd's interviews corroborated Rudd's testimony in all essential respects. Petitioner knew of Rudd's testimony at the prior trial. And, finally, the defense was given the complete case report, containing Rudd's statement of the case which, as we show in Point III, showed on its face that it embodied the contents of the notes.

III. Even if it be assumed *arguendo* that Rudd's notes were subject to production, failure to order their production did not constitute reversible error

Even if it is assumed that failure to require production of the notes was error, it was not prejudicial. As noted *supra*, p. 10, during the trial the government turned over to the defense Agent Rudd's complete case report. This report (some 22 pages) not only covers in minute detail every phase of the government's case, including a narrative statement, a list of exhibits and a list of witnesses and their anticipated testimony, but further recites in detail what Agent Rudd himself would testify concerning his interviews with petitioner during his investigation

(R. 138–146).[18] An analysis of Rudd's statement in this report reveals that it was prepared by the agent with the aid of his notes and encompasses the essential substance of these notes.

For example, Rudd testified at the trial that petitioner "immediately" admitted during the interview that he had prepared the prescription for "those addicts"—"old opium and heroin and morphine users" (R. 57). Rudd's statement in the case report recites, almost identically, that petitioner "voluntarily and spontaneously" stated that he left prescriptions with "those addicts" and that they had used "opium, heroin, morphine and dilaudid" (R. 139–140). Again, both in his direct testimony and in this statement, Rudd reports that petitioner thought it was "wonderful" that these persons could, by using his prescriptions, keep working and not have to go out on the street to buy heroin or a derivative (R. 67–68; 140). Moreover, both Rudd's trial testimony and his formal report similarly recounted petitioner's explanation of the arrangements relating to the prescriptions before his European trip (compare R. 68–69 with R. 140–141).[19] Since Rudd testified that prior to trial he

[18] Significantly, petitioner failed to use the detailed account of Rudd's interview with petitioner, or any other part of the report, in an attempt to impeach Rudd's testimony.

[19] Furthermore, in his testimony at the trial, Agent Rudd stated that, when he asked petitioner why he gave twenty-four tablets on one prescription, petitioner responded "[b]ecause they told me they needed it" (R. 68). In detailing similar questioning in his report, Rudd observed that he asked petitioner whether certain of these addicts could be withdrawn from methadon without suffering ill effects and petitioner replied: "It is possible, but they say they need it" (R. 142–143).

had refreshed his recollection from his notes, it seems clear, particularly as to his interview with petitioner, that his statement in the case report is the formal expression and recording of the notes. Moreover, Agent Water's testimony at trial fully squared with Rudd's version of what petitioner had told him (R. 97–100).

The situation here is parallel to that in *Rosenberg* v. *United States*, 360 U.S. 367. In that case this Court held that, although a letter written by the witness to the Assistant United States Attorney should have been turned over to the defendant under the terms of 18 U.S.C. 3500, failure to do so was not prejudicial error since the defense had obtained the very same information by other means. As this Court put it (p. 371): "[W]hen the very same information was possessed by defendant's counsel as would have been available were error not committed, it would offend common sense and the fair administration of justice to order a new trial". So it can be said here that, since the defense was possessed of the complete case report, which contained essentially the same information now sought, the petitioner could not have been prejudiced by his lack of opportunity to inspect Agent Rudd's notes.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals should be affirmed.

J. LEE RANKIN,
Solicitor General.
MALCOLM RICHARD WILKEY,
Assistant Attorney General.
BEATRICE ROSENBERG,
JEROME M. FEIT,
Attorneys.

APRIL 1960.

U.S. GOVERNMENT PRINTING OFFICE: 1960

LIBRARY
U. S.

FILED
APR 21 1960
JAMES R. BROWNING, Clerk

Supreme Court of the United States

No. 278

OCTOBER TERM, 1959

HARRY NEEDELMAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF PETITIONER IN REPLY TO BRIEF FOR THE UNITED STATES

HILTON R. CARR, JR.
HERBERT A. WARREN, JR.
A. C. DRESSLER
1408 Ainsley Building
Miami 32, Florida
Of Counsel for Petitioner

AUTHORITIES

	Page
Goldman v. United States, 316 U.S. 129, 62 S. Ct. 993, 86 L. Ed. 1322	5
Jencks v. United States, 353 U.S. 657, 77 S. Ct. 1007, 1 L. Ed. 2d 1103	3, 4, 5
Palermo v. United States, 360 U.S. 343, 79 S. Ct. 1217, 3 L. Ed. 2d 1287	3

FEDERAL STATUTES

18 U.S.C. §3500	1

Supreme Court of the United States

No. 278

OCTOBER TERM, 1959

HARRY NEEDELMAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF PETITIONER IN REPLY TO BRIEF FOR THE UNITED STATES

The government first argues that personal notes of a government agent which are not communicated to anyone are not within the reach of 18 U.S.C. 3500.

The record does not reflect that the notes of Agent Rudd were not communicated nor that such notes were not just as much a part of the government files as was the case report. Certainly, the denial of production by the trial judge of such notes was not upon such ground but solely upon the ground that the notes "may involve

many things." (R-93). It is likewise interesting to note that the original indictment was filed on October 18, 1955 (R-1). The case report of Agent Rudd is dated October 31, 1955 (R-138). We think it only fair to all concerned to assume that Agent Rudd communicated with his superiors and with the United States Attorney prior to the indictment being returned. We think it likewise fair to assume that such communications were predicated, to some extent at least, upon the contemporaneous notes of Agent Rudd. Lastly, we think it fair to state that the assumption of the government that the notes of Rudd were not communicated to any one cannot be sustained in the face of this record.

However, even assuming that the notes of Agent Rudd were not communicated to any one, it is the petitioner's contention that such notes are producible under 18 U.S.C. 3500. Insofar as 18 U.S.C. 3500 is concerned the factor of communication is important only to the extent that by virtue of the communication a statement comes into the possession of an agent of the government and thereby becomes subject to a possible claim of privilege. If the statement sought to be produced is the statement of a government agent such statement is already subject to a possible claim of privilege and the factor of communication is of no significance. The important factor to always be considered is that if a witness has made, at a time when his memory was fresher and more accurate, a recordation of the events about which he has now testified, such recordation should be produced for use in cross examining such witness. If by cross examination it is shown that such recordation does not jibe with the present testimony of the witness, the obvious inference is that the present testimony is incorrect. Thus

is served both the interest of the United States and the defendant in seeing that the truth is ascertained.

It was not the intention of Congress in adopting 18 U.S.C. 3500 to deny to defendants any of their constitutional rights. The primary concern of the act is with regulating and limiting defendants' access to government papers. **Palermo v. U. S., 360 U.S. at 354.** Whether the notes of an agent are communicated to any one or not such notes are government papers. The interest of Congress in regulating defense access to such notes would be the same whether the notes are communicated or not. It would be highly destructive of the congressional objective of regulating defense access to government papers to say that 18 U.S.C. 3500 does not apply to non-communicated notes of an agent. Under such an argument the government would be denied the protection afforded by 18 U.S.C. 3500 and the agent could be required to turn over directly to the defendant all of his notes in the manner prescribed by **Jencks v. United States, 353 U.S. 657.**

The petitioner submits that it was the intent of Congress that 18 U.S.C. 3500 encompass the notes, communicated or not, of a government agent and that the specific wording of 18 U.S.C. 3500 does embrace such notes.

The government presents as a basis for its attempted distinction between communicated and non-communicated notes the argument that the notes of an agent may be difficult to decipher. Such is obviously no basis for denying **production** of the notes. The **usefulness** of the notes in cross examination can only be determined by counsel for the defense after the notes have been produced. Cf.

Jencks v. U.S., 353 U.S. at 668. Under 18 U.S.C. 3500 if the notes pertain to the subject matter testified to by the witness and are fairly attributable to the witness they must be produced. The notes are then delivered to the defense unless the government interposes a claim that the notes contain matter which does not relate to the subject matter of the testimony of the witness. All that a defendant need show for production purposes is that the witness made a prior statement concerning the subject matter of his testimony. The defendant is thereupon entitled to the production of such prior statement in order that he may determine its usefulness in cross examination. Such was the law established by **Jencks v. U.S., 353 U.S. 657.** Such continues to be the law under 18 U.S.C. 3500, with the congressional purpose of protecting investigative secrets accomplished by the procedures set forth in the statute. As stated in **Jencks v. U.S., 353 U.S.,** at 669,

> "Relevancy and materiality for the purposes of production and inspection, with a view to use on cross examination, are established when the reports are shown to relate to the testimony of the witness."

It is no more necessary for the defense to make a preliminary showing that the notes of an agent will be intelligible and useful for cross examination than it is for the defense to make a preliminary showing that a conflict exists between the notes and the testimony of the agent. The requirement of a preliminary showing of conflict was rejected in **Jencks v. U.S.** The argument of the government for a preliminary showing of usefulness on cross examination must likewise be rejected. It

may be noted that an agent could very well communicate his report to his superior in a code adopted by them. Yet we do not understand the government to contend that the adoption of such code would prevent the production of the report.

The government argues that the rule of discretion announced in **Goldman v. U.S.**, 316 U.S. 129 for materials used to refresh recollection was not overruled by **Jencks v. U.S.** The government argues, on page 34 of its brief, that recollection may be refreshed by all sorts of documents not necessarily attributible to the witness. Perhaps some discretion does remain in the trial judge where the document used to refresh memory was not prepared by the witness. However, it is the petitioner's position that the broad holding of **Jencks v. U.S.** is that if the witness is the author of the document and if the document relates to the subject matter of the witness's testimony, the defendant is entitled to production of such document. 18 U.S.C. 3500 has not lessened the right but has merely provided procedural safeguards for the government's benefit.

It is to be noted that in **Goldman v. U.S.**, supra, this Court was undoubtedly concerned with the protection of government files from disclosure to the defendant. As noted by the Court:

> " . . . Where, as here, they are not only the witness's notes but are also part of the government's files, a large discretion must be allowed the trial judge."

Thus, the discretion allowed to the trial judge arose

by virtue of the fact that government papers were involved. In **Goldman v. U.S.** production was sought solely upon the basis that the witnesses had refreshed their memories from their notes. In **Jencks v. U.S.** production was allowed because the witness was the author of a document relevant to his testimony. The fact that government papers were involved was of no importance after the witness had testified. **Jencks** overruled **Goldman** to the extent that where the witness has made a prior statement relevant to this testimony the defendant is entitled to production of such statement as a matter of right, and the fact that the witness does not refer to such statement while testifying does not diminish that right. To the extent that the document sought to be produced is not attributible to the witness, **Jencks** has no application.

In the case at bar the witness Rudd prepared contemporaneous notes during his investigation. He then testified as to his investigation. Without more, the defendant would be entitled to notes under **Jencks v. United States.** The fact that the witness used the notes to refresh his memory served only to more firmly establish that such notes are relevant and fairly attributible to the witness.

The final argument of the government is that the error of the trial court was not prejudical. The basis for this argument is the unwarranted assumption by the government that the notes of Rudd contain the same information as the so-called case report. The case report, prepared some two weeks after the indictment was returned, appears to be more of a trial brief of testimony to be presented by the government to the jury than a contemporaneous recording of events. The value to the

defendant in being able to point out, on cross examination, the deletions and additions, if any, from the original notes cannot be overestimated. Be that as it may, the simple fact remains that the notes were not produced. This Court does not have the notes before it and is unable to examine them. This Court cannot say that the petitioner was possessed of the same information as he would have been had error not been committed. The error cannot be characterized as harmless.

Respectfully submitted

HILTON R. CARR, JR.
HERBERT A. WARREN, JR.
A. C. DRESSLER
1108 Ainsley Building
Miami 32, Florida,
Attorney for Petitioner

By Herbert A. Warren Jr.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that 5 copies of the foregoing Reply Brief of Petitioner were mailed to the Solicitor General, Department of Justice, Washington 25, D. C. this 20 day of April, 1960 by depositing the same in a United States post office with air mail postage prepaid and addressed to the Solicitor General, Department of Justice, Washington 25, D. C.

HILTON R. CARR, JR.
HERBERT A. WARREN, JR.
A. C. DRESSLER
1408 Ainsley Building
Miami 32, Florida
Attorneys for Petitioner

BY Herbert A. Warren Jr.

LIBRARY
SUPR[illegible] COURT, U S.

Office-Supreme Court, U.S.
FILED
JUN 9 19[illegible]
JAMES R. BROWNING, Clerk

Supreme Court of the United States

No. 275

OCTOBER TERM, 1959

HARRY NEEDLEMAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR REHEARING

HILTON R. CARR, JR.
HERBERT A. WARREN, JR.
A. C. DRESSLER
1408 Ainsley Building
Miami 32, Florida
Of Counsel for Petitioner

Supreme Court of the United States

No. 278

OCTOBER TERM, 1959

HARRY NEEDLEMAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR REHEARING

The petitioner respectfully petitions the Court to grant a rehearing of its Order entered in this cause May 16, 1960 dismissing the writ of certiorari as improvidently granted.

BASIC FACTS

In his petition for certiorari the petitioner tendered to the Court questions pertaining to the production of the contemporaneous notes of a government agent made during the course of his investigation and used by such gov-

ernment agent before testifying to refresh his recollection. The writ of certiorari was granted by this Court on October 12, 1959. Briefs were filed by the respective parties and oral argument had before the Court. On May 16, 1960 the Court entered its Order dismissing the writ as improvidently granted.

REASONS FOR GRANTING PETITION FOR HEARING

I

This Court has ruled that the writ of certiorari issued in this cause should be dismissed as improvidently granted. This ruling is predicated upon the Court's conclusion that the record does not adequately present the questions tendered in the petition. Such a ruling presents an intervening circumstance of substantial effect which should be considered on rehearing.

This Court has observed the practice that once certiorari has been granted a case should be disposed of on the premise that it is properly before the Court, in the absence of considerations appearing which were not manifest or fully apprehended at the time certiorari was granted. **The Monorosa v. Carbon Black Export, Inc., 359 U. S. 180; Ferguson v. Moore-McCormack Lines, Inc., 352 U. S. 521, 559 (separate opinion).**

It is the petitioner's contention that all pertinent portions of the record were set forth in the petition, and that no considerations concerning the adequacy of the record appeared after the granting of the writ of certiorari which were not manifest at the time the writ was granted.

In the petition for certiorari the petitioner set forth the pre-trial motion for the production of the notes of Agent Rudd (Pet. 3), the statement of the Court made during the trial denying the request for the notes (Pet. 3), and the opinion of the Court of Appeals (Pet. App. "A"). The government, in its brief in opposition to the petition, set forth the interrogation of Agent Rudd as to the preparation and use of his notes (Govn. Brief—7), the fact that there was apparently a conversation, not reported, between counsel and the trial judge out of the presence of the jury, after which the trial judge made his statement denying the request for the notes (Govn. Brief—8); that the case report of Agent Rudd was handed to counsel for the petitioner (Govn. Brief—8). The government set forth the contents of the case report (Govn. Brief 8-9). The petition for certiorari and the brief of government in opposition thereto set forth every pertinent portion of the record pertaining to the production of the notes. Subsequent proceedings have not produced any matters which in any way varied or contradicted the record as set forth in the initial application. Since the record was adequate for the granting of the writ and since all matters pertaining to the production of the notes appeared in the initial petition and the brief in opposition, the writ should not now be dismissed as improvidently granted.

This is not a case where a consideration present in the record is brought into "proper focus" on oral argument, **cf. The Monrosa v. Carbon Black Export, Inc., supra**; nor is this, in view of the Court of Appeals specific ruling upon the questions as tendered by the petition for certiorari, a case where closer scrutiny of the record made it doubtful if the lower court passed upon the question. **cf. U.S. v. Rimer, 220 U.S. 547**; nor is there any provision

in the record as to which this Court was not apprised at the time of the granting of the writ. **cf. Furness, Withy & Co. v. Yang Tsze Insurance Assn., 242 U.S. 430**; nor could there have been any misconception of the parties as to the state of the record **cf. Tyrrell v. District of Columbia, 243 U.S. 1**; nor does the record now reflect that the questions tendered were not considered by the District Court and the Court of Appeals, **cf. McCullough v. Kammerer, 323 U.S. 327**; nor does this Court now find a lack of prejudice to the petitioner, **cf. Goins v. United States, 306 U.S. 622.** The dismissal in this case is solely upon the ground of the inadequacy of the record to present the questions tendered.

The petitioner can find no reported instance where this Court has dismissed a writ of certiorari to a Circuit Court of Appeals as improvidently granted upon the ground that the record was inadequate to present the questions tendered, where all relevant portions of the record pertaining to the questions were before the Court at the time the writ was granted. Nor can petitioner find any instance where this Court dismissed a writ, upon the ground of inadequacy of the record to present the questions tendered, where the Court of Appeals had so specifically considered the questions tendered as in this case.

The record was adequate for the Court of Appeals to specifically decide the questions now presented by the petitioner. The record was adequate for the granting of the writ. Subsequent proceedings have produced nothing that was not before the Court when the writ was granted. The petitioner respectfully submits that the Court should grant a rehearing in this cause and should determine this cause upon the merits.

II

In ruling that the record is inadequate to present the questions tendered, this Court evidently determined that there was some deficiency in the record with reference to the trial procedure in requesting the production of the notes of the Agent Rudd and the ruling of the Court thereon. This ruling is an intervening circumstance of substantial effect which should be considered on rehearing because of the fact that no question was raised by the government as to adequacy of the record and petitioner has not had the occasion for fully briefing such question and presenting his argument with respect thereto.

The government raised no issue as to adequacy of the record in its Brief in Opposition to the petition nor in its brief upon the merits. The writ was granted upon the petition and the brief in opposition, which together set forth all pertinent portions of the record. The record had been adequate for the Court of Appeals to pass upon the questions now tendered by the petitioner; the record had been adquate for the granting of the writ by this Court, the adequacy of the record was not questioned by the government. Under such circumstances the petitioner did not include in his brief any argument with respect to the adequacy of the record. Indeed, the petitioner would have been subject to criticism had he devoted any portion of his brief to argument upon a matter which was not in controversy. The provisions of the record were discussed at oral argument, but such cannot serve as a substitute for an exhaustive written brief.

The petitioner submits that this Court should grant a rehearing in this cause, particularly with respect to the

adequacy of the record, and should afford to the parties the opportunity to submit additional briefs restricted to the question of the adequacy of the record to present the questions tendered.

III

The petitioner submits that, in view of the ruling of the Court that the record is inadequate to present the questions tendered, this court should grant a rehearing in the exercise of the Court's supervisory power to formulate and apply proper standards for enforcement of the criminal law in the federal courts, **cf. Marshall v. United States, 360 U.S. 310, 313.** The ruling by this Court that the record is inadequate raises a question as to the proper procedure which must be followed by defense counsel in preserving for appellate review any point pertaining to the production of statements of government witnesses under 18 U.S. C. 3500. This question is of great importance in the everyday practice of criminal law in the federal courts and should be considered and answered. It is a substantial ground available to the petitioner, although not previously presented. The petitioner contends that the procedure in the trial court in this case was as adequate to present the question of the court's error as that followed by defense counsel in **Jencks v. United States, 353 U.S. 657; Holmes v. United States, 271 F. 2d 635 (C.A. 4); and Bradford v. United States, 271 F. 2d 58 (C.A. 9).** Likewise, the crucial importance of the notes of the Agent Rudd in affording to the petitioner an opportunity of showing whether the agent Rudd was telling the truth as to statements attributed by him to the petitioner (see direct conflict between testimony of petitioner and Rudd appearing at R 57 and 122) raises the question of the ap-

plicability of the "plain error" provision of Rule 52 (b) of the Federal Rules of Criminal Procedure.[1] A definitive statement is needed as to the lengths defense counsel must go in making a record to show error under 18 U.S.C. 3500. A rehearing should be granted to consider such question.

CONCLUSION

For the foregoing reasons, petitioner respectfully prays that the Order of this Court dismissing the writ as improvidently granted be reheard and vacated and that upon further consideration upon the writ, the judgment of the Court of Appeals for the Fifth Circuit be reversed.

Respectfully submitted,

HILTON R. CARR, JR.
HERBERT A. WARREN, JR.
A. C. DRESSLER

BY

Attorney for Petitioner

[1]Rule 52(b) provides: "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the Court."

CERTIFICATE OF COUNSEL

The undersigned, HERBERT A. WARREN, JR., one of the attorneys for the petitioner, hereby certifies that the petition for rehearing filed in this cause is presented in good faith, that in his judgment said petition is restricted to the grounds specified in paragraph 2 of Rule 58 and that said petition is not interposed for delay.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that 5 copies of the foregoing Petition for Rehearing were mailed to the Solicitor General, Department of Justice, Washington 25, D.C. this____ day of June, 1960 by depositing the same in a United States post office with air mail postage prepaid and addressed to the Solicitor General Department of Justice, Washington 25, D.C.

HILTON R. CARR, JR.
HERBERT A. WARREN, JR.
A. C. DRESSLER
1408 Ainsley Building
Miami 32, Florida
Attorneys for Petitioner

By_____